

VOLUME II

Model Codes for Post-Conflict Criminal Justice

Model Code of Criminal Procedure

Vivienne O'Connor and Colette Rausch, editors



Peacebuilding and the Rule of Law

Prepublication praise for Model Codes

The *Model Code of Criminal Procedure* provides a global response to a question of global concern: how to translate international human rights and criminal law standards into everyday practices in post-conflict societies? Based on the work of hundreds of experts from across the world, this model code is an important guide to the critical tasks of establishing or reestablishing democracy, fighting impunity, providing justice, and promoting a more peaceful future for all mankind.

—**Paul Hernández Balmaceda**, Poder Judicial, Costa Rica

The *Model Code of Criminal Procedure* offers not only valuable guidance on conducting legal reform within post-conflict societies but also insightful commentary on two issues of concern to every state: adapting national legal systems to meet the challenges presented by new crime patterns, and ensuring that domestic law meets the criteria laid down in international human rights law. Furthermore, because it draws on a variety of legal cultures, the *Model Code of Criminal Procedure* presents a flexible, open-minded approach to tackling these common problems.

—**Héctor Hernández**, Alberto Hurtado University, Santiago de Chile

The *Model Code of Criminal Procedure* is a very important piece of work in the area of post-conflict justice. With its practical orientation and comprehensive coverage, it is in effect a user's guide to constructing justice systems in societies that are rising from the ashes of war and conflict. This volume should be read and reread not only by policy-makers and practitioners tasked with rebuilding post-conflict justice systems but also by students of criminal law, criminology, and criminal justice.

—**Ali Wardak**, United Nations Development Programme (UNDP), Afghanistan

The *Model Code of Criminal Procedure* represents a significant step forward in the struggle to establish the rule of law in post-conflict environments. This volume does far more than lay out a procedural system, constituting nothing less than a crystallization of the principles at work in a modern criminal justice system. Not merely an invaluable tool for post-conflict situations, the *Model Code of Criminal Procedure* is also a rich resource for every country looking to develop better standards in its protection of human rights.

—**Gonzalo Medina Schulz**, Guest Professor of Criminal Law, University of Chile

The publication of volume I of *Model Codes for Post-Conflict Criminal Justice* marks an advance of great international significance for post-conflict societies—the arrival of a criminal code drafted in admirably clear and uncomplicated language, supported by detailed commentaries, and designed explicitly for such societies. This code, with its

measured approach, will enable jurisdictions emerging from conflict to move quickly toward reestablishing the rule of law and a fair criminal justice system, without the need to start the reform process afresh. It is an outstanding piece of work.

—**Andrew Ashworth**, Vinerian Professor of English Law, University of Oxford

Countries in transition from conflict routinely face seemingly irreconcilable challenges: extremely limited capacity of the criminal justice system, the need to establish law and order in the midst of rising crime, and the need to comport with international human rights standards—all of which have to be tackled while respecting local culture and traditions. These challenges have vexed local governments and those in peace-keeping missions alike. *Model Codes for Post-Conflict Criminal Justice* provides, for the first time, an invaluable guide to addressing these multiple demands—and should help shorten the path to consolidated peace, functioning state institutions, stability, and the rule of law.

—**Ambassador Lakhdar Brahimi**, former Special Representative of the Secretary-General for Afghanistan, Haiti, and South Africa; and former Chairman, Panel on United Nations Peace Operations

Many post-conflict states, including Liberia, find it necessary to reform their judicial systems so that their laws deal effectively with crimes, address gender and human rights issues, and conform to international norms and standards. I am, therefore, grateful for the opportunity to have participated in this admirable project, which, after years of arduous legal research and drafting, has culminated in the publication of *Model Codes for Post-Conflict Criminal Justice*.

Model Codes for Post-Conflict Criminal Justice will be an immensely useful resource for reformers in Liberia and elsewhere as they engage in the development and reform of their criminal justice system. Its provisions, drawn from the laws of different states and drafted in plain English, may be used in drafting new criminal laws or amending existing provisions. The accompanying commentaries, as well as the references and other resources contained in this volume, provide invaluable background information and guidance.

—**Felicia V. Coleman**, Counselor-at-Law, former Associate Justice of the Supreme Court of Liberia, and a Member of the Task Force for the Establishment of the Law Reform Commission of Liberia

In post-conflict countries, the challenges involved in rebuilding the judicial system are great. A model penal code seems particularly necessary to ensure compatibility between national criminal laws and international norms and standards. More than merely reflecting cultural diversity, such an instrument would enable the harmonization of national and international norms around common values.

—**Mireille Delmas-Marty**, Professor and Chair of Comparative Legal Studies and the Internationalization of Law, Collège de France

The importance of this work for societies in transition from conflict and oppression to freedom and democracy cannot be overemphasized. It is a model of clarity, and the commentaries on each section are a valuable resource not only for practitioners

concerned with societies in transition but also for students. I also recommend it to journalists who work in the field of law enforcement.

—**Richard Goldstone**, former Judge, Constitutional Court of South Africa; and former Prosecutor, International Criminal Tribunals for the former Yugoslavia and for Rwanda

Model Codes for Post-Conflict Criminal Justice is a valuable resource for criminal law reform in post-conflict states. Its contents reflect recent advances in international criminal law instruments and draw on the accumulated knowledge and experience of the international criminal law community. Moreover, *Model Codes* takes into account the particular challenges presented by post-conflict countries, making it both a targeted and a practical tool.

—**Ma Kechang**, Professor of Law, Wuhan University, People's Republic of China

This first volume in the *Model Codes* series displays not only a remarkable depth of thought but also a commendable breadth of perspective. In this time of sharp cultural clashes, publics in the Middle East and elsewhere may regard *Model Codes* skeptically, as yet another Western export intended to supplant Muslim traditions. To its credit, however, the Model Codes Project has gone beyond the borders of Western legal expertise and sought substantive contributions from legal experts in the Muslim world. Such teamwork between scholars and practitioners from both Western countries and Muslim-majority countries is all too rare, and I hope that publication of *Model Codes* will help pave the way for an open, inclusive discussion on the dilemmas facing post-conflict societies, particularly those in the Middle East. And in Muslim-majority countries emerging from conflict, we now need to approach the lawyers working in the Islamic seminaries and further integrate them and the language of Islamic law into the dialogue. By doing so, we will help facilitate the process by which such states can transition from violence to an enduring peace rooted in the rule of law.

—**Mohsen Rahami**, Professor of Criminal Law and Criminal Policy, Faculty of Law and Political Science, University of Tehran

Model Codes for Post-Conflict Criminal Justice provides excellent guidance for the implementation of new criminal laws in post-conflict states. The statutory offenses as well as the general rules for criminal liability and the proposed catalogue of penalties, including alternative sanctions and measures such as asset confiscation and victim compensation, reflect the state of the art in international standards and best practices.

—**Dmitry A. Shestakov**, Professor, Doctor of Law, and President of St. Petersburg Criminology Club, Russia

It is axiomatic that conflict destroys: it destroys people, their institutions, and the law in whole or in part. But conflict also breeds new companions who evolve, thrive, and finally outlive the hostilities: welcome to the world of the war-profiteer. Organized and wealthy, these individuals, and their illicit networks, often emerge from conflict with political and social power, which they use to accumulate enormous fortunes, siphoning off the money pouring into the country and basking in the absence of regulatory

and enforcement mechanisms that could check their rampant corruption and criminality.

Any attempt by the international community to rebuild a shattered society will lie in peril without the presence, early on, of institutions that promote and safeguard the rule of law. And central to the maintenance of the rule of law is the existence of a criminal code. In societies emerging from conflict, the local authorities may well deem part or all of the old code unworkable, resulting in a need to refashion some provisions of the existing code or identify a stop-gap measure to adopt until a new code can be established. After all, even from the earliest days of recovery, police, prosecutors, judges, peacekeepers, and most importantly the citizenry need both the assurance that there is a law and clarity as to what that law is.

Model Codes for Post-Conflict Criminal Justice provides a crucial resource to address this need. It reflects clearly the input of hundreds of experts and practitioners drawn from across the globe. The codes and their commentaries will be invaluable to local governments and peacekeeping missions involved in law reform, providing a clear legal framework that meets with international standards and is cognizant of the challenges that come with post-conflict environments.

—**H.R.H. Prince Zeid Ra'ad Zeid al-Husseini**, Ambassador of the Hashemite Kingdom of Jordan to the United States, former Permanent Representative of the Hashemite Kingdom of Jordan to the United Nations, and former President, Assembly of States Parties, International Criminal Court

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with Hans-Joerg Albrecht and Goran Klemencic

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Foreword

Louise Arbour, United Nations High Commissioner for Human Rights

**Antonio Maria Costa, Executive Director of
the United Nations Office on Drugs and Crime**

Conflicts do not end suddenly. Even when violence stops, peace often remains fragile and will not become durable unless there is justice and a readiness to address not only the aftermath of a conflict but also its root causes. Many conflicts erupt because of perceptions of discrimination and injustice. Restoring the rule of law is, therefore, an important dimension of peacebuilding, one that requires sustained and patient engagement until the rule of law is strong. Where the rule of law is weak, public security is threatened and criminals feel empowered. Such a situation undermines efforts to restore respect for human rights and build democracy and civil society, fuels crime and corruption, and risks triggering a return to conflict. Criminal justice that is based on human rights is thus indispensable for making and sustaining peace.

The classic peacekeeping model brings to mind blue-helmeted soldiers working under the United Nations flag to restore order and maintain security. That kind of peacekeeping, while essential, will not by itself build durable peace. Long-term security depends first and foremost on the creation or restoration of the rule of law. The rule of law requires not just rule by law, but rule by laws that reflect fundamental principles of criminal responsibility and due process, including guarantees of transparency and clarity of the criminal justice process, nonretroactivity, fair and independent adjudication, and proportional punishment.

The United Nations Office on Drugs and Crime and the Office of the High Commissioner for Human Rights have therefore welcomed the initiative launched by the United States Institute of Peace and the Irish Centre for Human Rights to strengthen criminal justice in post-conflict societies, and have supported the project in several ways, including facilitating a number of experts' meetings to review the draft Model Codes.

Publication of *Model Codes for Post-Conflict Criminal Justice*, the product of five years of work involving hundreds of experts from across the world, is a significant contribution to the United Nations' efforts to strengthen peacebuilding. Based on United Nations standards, the Model Codes provide practical guidance on how to translate international human rights and criminal law standards into everyday practice.

There is no single recipe for effective criminal justice. The Model Codes are not a one-size-fits-all solution. On the contrary, they have been devised to be adaptable to a variety of post-conflict societies and situations in ways that are flexible yet consistent with international norms and standards. The Model Codes are a resource that should be used by all those engaged in building peaceful societies based on the rule of law. ■

Preface

Neil Kritz, Director, Rule of Law Program, United States Institute of Peace

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According to the *Oxford English Dictionary*, a code is a systematic collection or digest of laws, a body of laws so arranged as to avoid inconsistency and overlapping. The first extant code, the Code of Hammurabi, was composed nearly four millennia ago. Justinian created a code with which to rule the Roman Empire. Many countries still operate with the legacy of these early efforts at legal codification. Historically, codes were an instrument of law reform, often intended to make the law more accessible and coherent. Over time, it has become universally recognized that an effective framework of criminal law and procedure is essential to the development of a stable society.

Although the codes presented in *Model Codes for Post-Conflict Criminal Justice* share many of the same objectives as other codifications, they also have some unique and original purposes. Essentially, they are designed as a tool for what is today often referred to as “post-conflict justice.” It is only recently that this has become a priority of the international community. Interest in the subject seems to have begun during the late 1970s and early 1980s, when human rights bodies began to focus on the duties of the state in terms of criminal justice. Soon, reports were circulating within the United Nations about the rights of victims, the need for accountability, and the fight against impunity. International standards and treaties were adopted to elaborate the human rights protections that had to be reflected in the administration of criminal justice.

In parallel, peacekeeping operations began to be increasingly robust, assuming responsibilities in a range of areas beyond the peacekeepers’ traditional role of policing cease-fire lines. Human rights divisions began to figure in peace support operations, as did a growing agenda for various measures to promote peace, stability, and political and economic recovery. One important item on this agenda was ensuring some degree of accountability for the crimes of the past while promoting a sense of security and law and order in the present. Stabilization efforts had to maintain social order as conflict was winding down, deal with the general breakdown of authority, and confront the criminal vultures who routinely descend upon the disorganization of the post-conflict environment while still promoting values of tolerance, fairness, and transparency and adherence to international human rights standards so as to help nurture the beginnings of democracy.

The idea of creating model codes for post-conflict justice was much discussed at the end of the 1990s by rule-of-law practitioners working with United Nations peace operations in places such as Cambodia, East Timor, and Kosovo. In each of these environments, professional jurists found the criminal justice system in disarray and a need not only for infrastructural renewal but also for substantive law reform. The confusion as to what constituted the applicable law in these and other post-conflict settings and

how that law would be applied resulted in the loss of many crucial months in the stabilization effort. Public confidence in a peace process will be weak as long as that public faces rampant crime and an unfair justice system. Clearly, new tools were needed.

The model code concept received official recognition in the *Report of the Panel on United Nations Peace Operations*, often called the “Brahimi Report” after its distinguished chair, veteran diplomat Lakhdar Brahimi. The report saw model codes as an off-the-shelf legal system that could, if necessary, be applied as part of a peace support mission. Ambassador Brahimi’s proposal did not sit well with everyone, however, apparently because of concern that model codes would be a creeping form of judicial imperialism. At the very least, the proponents of the model codes concept needed to refine its focus, emphasizing the flexibility of what was intended as a palette of options rather than a prescriptive, one-size-fits-all package.

Inspired by the Brahimi Report recommendation, in 2001 the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime, launched what soon became widely known as the “Model Codes Project.”

Initially, a small group of experts was convened to create a draft of the Model Codes. In recognition of the critical importance of widespread consultation and participation, the expert group soon mushroomed into a network of three hundred experts from all regions of the world, encompassing both academic and practitioner communities. The experts included comparative and international law experts, judges, prosecutors, defense counsel, police, human rights advocates, and military officers. The meetings were a stimulating venue for debates and exchanges about comparative criminal law, involving the differing perspectives of the prosecution, the police, the defense, and the judiciary.

What began as a single code soon morphed into four separate but complementary instruments. Published in three volumes collectively known as *Model Codes for Post-Conflict Criminal Justice*, these instruments include a Model Criminal Code, a Model Code of Criminal Procedure, a Model Detention Act, and a Model Police Powers Act.

The Model Codes reflect elements drawn from all of the major criminal justice systems in the world. They are strongly influenced by the comparative law discourse of the international criminal tribunals, as well as the practice of post-conflict justice in countries around the world. The vision of no single criminal justice system is allowed to predominate. Indeed, it was deemed essential that jurists from a variety of traditions would, so to speak, recognize themselves in the finished product, finding familiar concepts and terminology—which means, of course, that there is also much that is unfamiliar for practically everyone.

The Model Codes are a tool of assistance and not imposition. They expand the range of options available to drafters of post-conflict criminal laws. Of singular importance, the Model Codes are especially useful because they are tailored to the exigencies of the challenging post-conflict environment.

With apologies to Winston Churchill, this is not the end of the Model Codes Project, but rather the end of the beginning. Tools to be used in building post-conflict justice, the Model Codes are very much a work in progress, to be refined and amended,

more or less like all other codes. They will grow with our experience in this important endeavor of promoting justice, democracy, and peace.

We would like to express our appreciation to the editors, our partner organizations, and all those who have contributed to Model Codes Project. ■

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The Model Codes for Post-Conflict Criminal Justice Project was launched in 2001 by the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Office on Drugs and Crime (UNODC). For their unwavering commitment to such an ambitious project, from its initial conception to the publication of this volume, we are deeply grateful to the president of the United States Institute of Peace, Ambassador Richard Solomon; to the Institute's associate vice president and director of its Rule of Law Program, Neil J. Kritz; and to the director of the Irish Centre for Human Rights, Professor William Schabas. Neil Kritz and William Schabas are due particular thanks for the wise advice and constant encouragement they provided throughout the project's development.

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As the following lists of organizations and individuals who contributed to the Model Codes Project make clear, great efforts were made to obtain the input of a diverse community of experts with knowledge and experience relevant to the post-conflict criminal law reform process. In all, some three hundred people from more than one hundred organizations and over fifty countries contributed to the Model Codes Project. Some helped to create the broad framework for the project, others drafted specific provisions and commentaries, still others critiqued and refined those drafts; all of them gave generously of their time and considerable expertise.

International and Regional Organizations

- African Commission on Human and Peoples' Rights
- Council of Europe
- European Commission and European Council
- Organization for Security and Co-operation in Europe (OSCE)
- United Nations
 - Children's Fund (UNICEF)
 - Department of Peacekeeping Operations (DPKO)
 - Department of Political Affairs (DPA)
 - Development Fund for Women (UNIFEM)
 - Development Programme (UNDP)
 - International Criminal Tribunal for Rwanda (ICTR)
 - International Criminal Tribunal for the former Yugoslavia (ICTY)
 - Office of Legal Affairs (OLA)
 - Office of the High Commissioner for Human Rights (OHCHR)
 - Office on Drugs and Crime (UNODC)

Civil Society and Non-Governmental Organizations

- AIRE Centre
- Amnesty International
- Asian Human Rights Commission
- Cambodian Defenders Project

- Criminal Defence Resource Centre, Kosovo
- Foundation for Law, Human Rights and Justice, East Timor
- Informal Sector Service Centre, Nepal
- International Center for Transitional Justice
- International Committee of the Red Cross
- International Development Law Organization
- Minority Rights Group
- National Forum for Human Rights, Sierra Leone
- Open Society Justice Initiative
- Penal Reform International

Professional Associations, Training Institutions, and National Commissions

- African Bar Association
- American Corrections Association
- Association of Female Lawyers, Liberia
- Commission for Reception, Truth and Reconciliation, East Timor
- International Association of Prosecutors
- International Corrections and Prisons Association
- International Criminal Defence Attorneys Association
- Joint Advisory Committee on Legislative Matters, Kosovo
- Justice Council, Institute of Training and Law Reform, Sudan
- Law Reform Commission Task Force, Liberia
- Liberian National Law Enforcement Association
- Kosovo Chamber of Advocates
- Magistrates School, Cambodia
- Nepal Bar Association
- National Human Rights Commission, Nepal
- Southeast Asia Regional Centre for Counter-Terrorism, Malaysia
- West African Bar Association

Research and Academic Institutions

- Academy of Military Science, China
- Asia-Pacific Centre for Military Law, Australia
- Charles University, Czech Republic
- College of William and Mary, United States

- Defense Institute of International Legal Studies, United States
- Eins Shams University, Egypt
- Georgetown University, United States
- International Human Rights Law Institute, United States
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- United Nations Mission of Support in East Timor (UNMISSET)
- United Nations Operation in Mozambique (ONUMOZ)
- United Nations Stabilization Mission in Haiti (MINUSTAH)
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| • Germany | • Slovenia |
| • Ghana | • South Africa |
| • Haiti | • Spain |
| • Hungary | • Sri Lanka |
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| • Iraq | • Sweden |
| • Ireland | • Thailand |
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Abbreviations

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IPTF	International Police Task Force
KFOR	Kosovo Force (NATO-led international military force)
OHCHR	Office of the United Nations High Commissioner for Human Rights
OHR	Office of the High Representative
OSCE	Organization for Security and Co-operation in Europe
UNAMIS	United Nations Advance Mission in the Sudan
UNAMSIL	United Nations Mission in Sierra Leone
UNDP	United Nations Development Programme
UNDPKO	United Nations Department of Peacekeeping Operations
UNICEF	United Nations Children’s Fund
UNIFEM	United Nations Development Fund for Women
UNMIK	United Nations Mission in Kosovo
UNMIL	United Nations Mission in Liberia
UNMISET	United Nations Mission of Support in East Timor
UNODC	United Nations Office on Drugs and Crime
UNTAC	United Nations Transitional Authority in Cambodia
UNTAET	United Nations Transitional Administration in East Timor

USER'S GUIDE

Introduction

This User's Guide introduces the *Model Codes for Post-Conflict Criminal Justice*, a three-volume series designed to assist those working in criminal law reform in post-conflict states. The series is the product of a five-year project spearheaded by the United States Institute of Peace and the Irish Centre for Human Rights, in cooperation with the United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime.

This volume, volume II, contains the second of the model codes—the Model Code of Criminal Procedure. Volume I contains the Model Criminal Code, while volume III contains the Model Detention Act and the Model Police Powers Act.

This User's Guide is divided into four chapters. Chapter 1 outlines the need for criminal law reform in post-conflict states, the evolution of interest in the topic among the international community, and the drafting and consultation process used to create the model codes. Chapter 2 discusses the many potential uses of the model codes in post-conflict criminal law reform efforts. Chapter 3 provides a synopsis of the Model Code of Criminal Procedure. Chapter 4 sets out guiding principles for those involved in the process of criminal law reform.

Chapter 1

The Model Codes Project

A Response to Post-Conflict Criminal Law Needs

For national and international actors involved in post-conflict peacebuilding, the reestablishment of the rule of law is vital. Criminal justice systems are often shattered or severely debilitated in the aftermath of conflict. Prisons, police stations, and courthouses may be destroyed. Lawyers and judges may have fled the country. The police force may be nonexistent. In some cases, as United Nations peace operations have discovered to their dismay, the criminal justice system has ceased to function completely.

Such an environment can be a breeding ground for serious criminality, with criminals and criminal gangs operating freely in a climate of impunity. While war crimes and crimes against humanity may come to a halt as a cease-fire or peace agreement takes effect, crimes such as rape, extortion, murder, and kidnapping often continue unabated. Ethnic tensions may reemerge in the post-conflict period and manifest themselves as revenge attacks, hate speech, and attacks on personal and cultural property. Sexual violence is also prevalent in post-conflict states. In addition, organized criminal groups are often involved in a wide variety of serious crimes, including trafficking in persons, drugs, and weapons; smuggling; and money laundering.

Violent conflict and subsequent criminality in the post-conflict environment create a climate of fear, mistrust, and insecurity. Humans suffer both from direct exposure to violence and from extreme feelings of insecurity, and crave an environment in which others can be trusted again. Trust is a major ingredient of the social capital of a post-conflict society. It is vital to fostering public compliance with both social and legal norms, to ensuring that post-conflict states do not revert back to conflict, and to building peace.

Reestablishing or reforming a fractured criminal justice system is also critical to the success of peacebuilding efforts, but it is typically a Herculean task demanding the commitment and expertise of many different national and international actors. It can involve a host of interrelated activities, from providing basic resources such as pens and paper and police uniforms to rebuilding courthouses and prisons, from recruiting and vetting new criminal justice personnel to restructuring the entire police force or court system.

It is also critical to look beyond resources and infrastructure, staffing and restructuring, to the laws to be applied in the pursuit of justice. Even a system that is well

resourced, well staffed, and institutionally robust will fail to serve the needs of the community unless its laws are adequate.

What constitutes an “adequate” legal framework? In practical terms, as discussed in the United Nations secretary-general’s 2004 report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (UN doc. S/2004/616, paragraphs 6 and 7), all domestic laws must be “consistent with international human rights norms and standards”; be “legally certain” (i.e., clearly defined, accessible, foreseeable, and neither contradictory nor overlapping); and comply with the principle of justice (i.e., protect and vindicate rights, punish wrongs, and protect the rights of the accused while taking into account the interests of victims and the well-being of society at large).

Unfortunately, criminal laws in post-conflict societies rarely meet these criteria. “Legislative frameworks” in post-conflict states, comments *The Rule of Law and Transitional Justice*, “often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards.” For instance, legal certainty was conspicuously absent from Afghanistan after the fall of the Taliban, with the country subject to some twenty-four hundred overlapping and often contradictory bodies of law that had been allowed to accumulate over the preceding four decades and changing administrations.

Furthermore, criminal justice legislation in post-conflict states is often outdated. To take just a few examples: In post-conflict Angola, the penal code dated to 1886. In Liberia, human trafficking was widespread but not adequately addressed in the penal code, which had not been amended since the 1970s. In Kosovo, human trafficking, terrorism, organized crime, and the possession and use of illegal firearms were all prevalent but were poorly covered in the applicable criminal law. To make matters worse, while many post-conflict states are plagued with complex crimes such as trafficking and money laundering, those states’ legal frameworks typically do not contain provisions for covert surveillance, witness protection, or other measures that are vital to the investigation and prosecution of such crimes.

Previous Post-Conflict Criminal Law Reform Efforts

The pronounced inadequacies of some post-conflict criminal laws have inspired several efforts to reform existing laws. In Cambodia, for instance, the dysfunctional criminal justice system bequeathed by the Khmer Rouge prompted significant legal reform both during the mandate (1992–93) of the United Nations Transitional Authority in Cambodia (UNTAC) and subsequently. Among other areas targeted by this legislation were criminal law and procedure, police powers, the prisons system, and the court system.

In Kosovo, the United Nations Mission (UNMIK) established in 1999 passed numerous regulations to fill gaps in the existing criminal law. Some regulations have been designed to ensure that the law complies with international human rights norms and standards; others have added new offenses, such as human trafficking; still others

have sought to give police and prosecutors the tools they need to investigate and prosecute serious crimes.

The United Nations Transitional Administration in East Timor (UNTAET), whose mandate ran from October 1999 to May 2002, deemed the Indonesian criminal procedure code to be overly complicated and unsuitable for application in post-conflict East Timor, and so promulgated new regulations on criminal procedure and the courts. It also promulgated regulations on firearms and election-related criminal offenses.

Such attempts to reform the criminal law have not met with universal praise, however, underlining the complexity of the task and the heavy demands it places on time, resources, and expertise. In Cambodia, for instance, the UNTAC code, the first piece of law reform introduced during the country's transition, has been widely criticized for lacking clarity, contradicting other laws, and being inconsistent with basic human rights provisions.

In Kosovo, during UNMIK's first years, the special representative of the United Nations secretary-general issued executive orders for detention of individuals, even after the courts—including in some cases courts composed entirely of international judges—had ordered individuals released for lack of evidence, and even when the releases had been proposed by international prosecutors. Criticism of the executive orders came from many directions, including from the Organization for Security and Cooperation in Europe, international human rights organizations, and the UNMIK ombudsman, who argued that the orders for detention violated the principle of judicial independence and failed to provide for judicial review.

In East Timor, individuals in the justice system noted several fundamental gaps in UNTAET regulations that served as the transitional criminal procedure code until 2006. The regulations did not include issues such as the requisite burden of proof and standards relating to the competency of witnesses. Criminal justice actors effectively had to make up their own rules and fill the gaps in the applicable legislation, which enhanced the legal uncertainty in East Timor.

Criminal Law Reform in the International Spotlight

The cases of Cambodia, Kosovo, and East Timor focused international attention on the importance of the rule of law in post-conflict states and, in particular, on the importance of criminal law reform. Many actors involved in the law reform process in these three places spotlighted the deficiencies in both the substance of some of the laws that were drafted and the process by which they were drafted. In the late 1990s and early 2000, the subject of criminal law reform was widely debated, with practitioners and policymakers looking to learn lessons from past mistakes and move forward confidently and effectively.

Recognizing the need to reconfigure the international community's approach to post-conflict peacebuilding in peace operations, including criminal law reform, in 2000 the United Nations issued the *Report of the Panel on United Nations Peace Operations*, otherwise known as the Brahimi Report. One segment of the report focused primarily on reform efforts in Kosovo and East Timor, where the United Nations had

executive authority to pass new laws. In light of the United Nations' immense difficulties in designating and speedily reforming the applicable laws in both territories, the report recommended the drafting of an interim criminal code to be used in future executive missions where confusion surrounded the applicable law. International personnel, such as United Nations Civilian Police and international judges and prosecutors, could familiarize themselves with the interim code before being deployed and could quickly apply its provisions pending reforms of the domestic legal framework.

The Brahimi Report elicited mixed reactions. While there was support from some quarters, many disagreed with the imposition of an interim code in a post-conflict state, even where the United Nations had lawmaking powers and where many international actors were working within the post-conflict criminal justice system. Others felt that the recommendation to create an interim code was not relevant, given that another executive mission was unlikely to be mandated in the near future.

In the years that followed the Brahimi Report, although no new executive mission was anticipated, post-conflict criminal law reform remained high on the international rule-of-law agenda. The discussion of the creation of an interim code morphed into a debate on the use of Model Codes as a law reform tool. This idea, which had been broached even before the Brahimi Report appeared, earned the support of the authors of the *Rule of Law and Transitional Justice*, who urged the international community “to eschew one-size-fits-all formulas and the importation of foreign models” and supported the creation of Model Codes as tools to inform a locally led reform process.

The Evolution of the Model Codes Project

Within a year of publication of the Brahimi Report, the United States Institute of Peace and the Irish Centre for Human Rights launched the Model Codes for Post-Conflict Justice Project (hereafter, the Model Codes Project) to explore the issues the report had raised. The United Nations Office of the High Commissioner for Human Rights and the United Nations Office on Drugs and Crime subsequently joined the project, lending their technical expertise in the development of criminal law provisions designed for post-conflict situations.

The original purpose of the Model Codes Project was to draft a set of interim criminal codes that could be used either in the manner suggested in the Brahimi Report or as a resource in the process of post-conflict law reform generally. In the early days of the project, the main focus was on the former use; over time, however, the project began to concentrate on creating model laws to act as tools in domestic criminal law reform.

Over the next five years, the project brought together some three hundred experts from around the world to develop a set of codes. There were three phases in the process of drafting and consultation. The first phase commenced in late 2001, when a core team of experts—practitioners, lawyers, police officials, military personnel, and academics from different regions and different legal backgrounds—convened to exchange ideas and write early drafts of the codes. Eighteen months later, the group had completed their drafts of the four Model Codes: a criminal code, a code of criminal procedure, a detention act, and a police powers act.

The second phase was a broad consultative process during which the draft codes were vetted by a diverse group of experts from around the world. These experts hailed from the academic and the practitioner communities and included scholars of criminal law, comparative criminal law, international law, international human rights laws, and police law; international and national judges; prosecutors; defense lawyers; police officials; prison officials; human rights advocates; and military lawyers.

The second phase involved individual consultations with experts and fieldwork consultations in places ranging from East Timor to Kosovo, Liberia, Nepal, and southern Sudan. In addition, consultations were held and presentations were made at various forums in Geneva, New York, Ireland, Vienna, Beijing, Washington D.C., Madrid, Canada, Berlin, and Sweden. Furthermore, a series of regional meetings were held to assess the potential utility of the codes in a regional context and test their compatibility with a variety of different legal systems. An Africa roundtable was held in Abuja, Nigeria, and a follow-on meeting was conducted in London. Asia roundtable meetings were held in Bangkok, Thailand, and Melbourne, Australia. A meeting of Islamic legal experts was convened in Siracusa, Italy. These meetings allowed a very broad range of opinions to be canvassed. (For a full list of individuals and organizations who contributed to the Model Codes Project, see the section “Contributors” near the beginning of this volume.)

In the third phase, a core group of experts collated and considered all the comments and suggestions made on the substantive provisions of the Model Codes. Some recommendations received during the consultation process required substantial changes to the text or the drafting of entirely new provisions. The group also expanded the commentaries based on suggestions received. Thereafter, a final round of expert review was conducted.

The value of the Model Codes as law reform tools derives in large part from the breadth and intensity of the consultation and review process conducted throughout the codes’ development. The codes were developed through a rigorous, academically grounded process of research and drafting coupled with a vibrant and open discourse among a broad and diverse community of experts. Considerable comparative analysis, research, and debate went into the drafting of both the provisions and the commentaries.

The result of this process of collaborative drafting, extensive consultation, and thorough review was a set of four integrated Model Codes: the Model Criminal Code, the Model Code of Criminal Procedure, the Model Detention Act, and the Model Police Powers Act. None of these codes is the product of any one legal system or legal culture; to the contrary, each represents a blending of different legal elements, some drawn from international conventions or best-practice principles, others drafted specifically for this project.

Publication of *Model Codes for Post-Conflict Criminal Justice*

The completed drafts were readied for publication by the United States Institute of Peace Press. It was decided to publish the four codes in three volumes, collectively known as *Model Codes for Post-Conflict Criminal Justice*.

Volume I (published in spring 2007) contains the Model Criminal Code (MCC). The MCC is a criminal code, or penal code, that focuses on substantive criminal law. Substantive criminal law regulates what conduct is deemed to be criminal, general principles of criminal law, the conditions under which a person may be held criminally responsible, and the relevant penalties that apply to a person convicted of a criminal offense. A synopsis of the substantive content of the MCC is presented in chapter 3 of this User's Guide.

Volume II contains the Model Code of Criminal Procedure, which focuses on procedural criminal law, a body of rules and procedures that govern how a criminal case will be investigated and adjudicated.

Volume III features both the Model Detention Act and the Model Police Powers Act. The Model Detention Act governs the laws and procedures to be applied by the criminal justice system to persons detained prior to and during a criminal trial, and also those who are convicted of a criminal offense. The Model Police Powers Act sets out relevant powers and duties of the police in the sphere of criminal investigations, in addition to relevant procedures to be followed in investigating criminal offenses. Moreover, the Model Police Powers Act contains additional police powers and duties and the relevant procedures to be followed by police in the maintenance of public order.

Chapter 2

Potential Uses of the Model Codes in a Criminal Law Reform Process

A Tool Tailored to the Specific Needs of Post-Conflict States

A common practice in the process of post-conflict criminal law reform is to look for inspiration in bodies of laws from different states. This approach can significantly expedite the process of law reform and circumvent the need to draft new legal provisions from scratch. That said, a blind transplant of a legal provision from one state to another—without an assessment of whether the foreign legal provision is workable in another context and without consideration of whether the provision fits with the receiving state’s culture and legal system—is unwise. But where it is considered appropriate and useful, the laws of other states may be used as the basis of new criminal provisions either by modifying them to fit the local context or by including them wholesale in newly drafted laws. Where an external legal provision is considered inappropriate for inclusion, it might still be useful as a source of inspiration or as a starting point in the drafting of entirely new legal provisions.

A yet more useful tool, however, is a source of law tailored specifically to the particular context of post-conflict criminal law reform. The four codes contained in *Model Codes for Post-Conflict Criminal Justice* are designed to be just such a tool. The term *model* is not meant to imply that a model law is the best or the only option in the criminal law reform process, or indeed that it should be used in whole. Instead, the term *model* is used in the sense of providing a sample law or a useful example. The Model Codes can be used along with any number of other sources in drafting new provisions of criminal law in post-conflict states.

The Model Codes as a potential tool of law reform are not meant to be imposed upon a post-conflict state; they are a tool of assistance and not a tool of imposition. Furthermore, if law reformers do opt to use the Model Codes, they can use them in any number of ways, from a means of sparking debate on one aspect of criminal law reform to the basis for drafting a new provision in a criminal law code.

Throughout the development of *Model Codes for Post-Conflict Criminal Justice*, the drafters asked themselves how the Model Codes could best assist actors working in post-conflict situations. For example, when they chose the sorts of criminal offenses to include in the Special Part of the MCC, the drafters focused not on the full range of criminal offenses found in many countries' criminal codes but instead on serious crimes, including those criminal offenses that occur most commonly in a post-conflict state and those that are often absent from existing criminal laws. Consultations and in-depth research resulted in the creation of a catalog of criminal offenses that reflects the specific needs of actors involved in post-conflict criminal law reform.

Filling the gaps in post-conflict criminal laws requires providing not only broad principles of law and specific legal provisions but also sufficient guidance on how to apply these principles and provisions. A common complaint about the criminal law framework in many post-conflict states, and indeed about newly drafted criminal legislation in post-conflict states, relates to the dearth of such guidance. Such shortcomings lead to confusion in the application of the law and sometimes result in the application of different standards by different actors, each interpreting the provisions in a different way. The need for specific guidance in criminal legislation is especially accentuated in post-conflict states, where criminal justice actors may have fled and criminal justice is often doled out by inexperienced or newly retrained police officers, judges, lawyers, and prison officials.

These oft-heard concerns about the need for clarity and guidance led to a specific style of drafting the Model Codes. First, the codes are drafted in a "plain-English style" that seeks to convey information in as simple and accessible a manner as possible. Obscure legal terms are replaced by more straightforward language without sacrificing the integrity of the text. Not only does this approach make laws more understandable to those applying them, but it also makes the laws more accessible to those to whom they are applied.

Second, the Model Codes are more detailed and prescriptive than most criminal laws. Often, criminal laws and procedures are supplemented by a "statutory instrument," "ancillary legislation," "implementing regulations," or "standard operating procedures" that fill the gaps in the more general text. To provide maximum guidance to criminal justice actors and to help close potential gaps that could lead to confusion or misapplication, the Model Codes contain both legal provisions and commentaries that contain guidance on the practical implementation of those provisions. The commentary to each provision elaborates on the purpose and content of the provision and explains how it should be applied.

These commentaries assist the reader in a number of other ways, too. For example, they explain wording choices. They also highlight other reforms or initiatives that may be necessary if a particular provision is introduced into law. These may include institutional reforms, other criminal law reforms, or reforms of bodies of law outside criminal law. They also provide comparative lessons drawn from other post-conflict cases.

In tailoring the Model Codes for use in post-conflict situations, the drafters were attentive to the fact that the existing criminal law framework in a post-conflict state does not always comply with international human rights norms and standards. In the aftermath of conflict, law reform efforts often focus on replacing old laws with laws that comply with human rights norms and standards. Many experts have cited the

difficulty of translating abstract norms of international human rights law into concrete provisions of criminal law. To assist in this translation, the Model Codes have been drafted so as to transform international standards into concrete provisions of law that are compliant with these standards while still taking into account the exigencies of a post-conflict state, such as a lack of resources.

The Model Codes were also drafted to take into account potential cross-cultural application in a variety of settings around the world. As discussed above, a series of regional meetings tested the thesis that the Model Codes could potentially be used universally as a law reform tool. The experts who took part in the meetings supported this thesis, while of course acknowledging that criminal laws should fit the environment in which they are applied. The substantive provisions of the Model Codes were inspired by a variety of international legal systems and legislation. The Model Codes do not follow one particular legal tradition but instead blend legal systems to create a hybrid body of laws—an increasingly common occurrence in many criminal law reform processes.

A Flexible Tool: Six Scenarios for the Use of the Model Codes

The practical uses of the Model Codes in post-conflict law reform are many and varied. The codes can be helpful to actors engaged in small-scale and ad hoc reforms of discrete sections of the existing criminal law, as well as to actors working on large-scale restructuring of an entire domestic criminal law framework.

In the rest of this chapter, we highlight six scenarios in which the Model Codes could prove a valuable resource:

- A post-conflict state is revising its existing criminal law framework (potentially including its criminal code, criminal procedure code, prisons legislation, and police legislation) to define new criminal offenses and include new tools with which to investigate those crimes and to update its existing criminal laws to replace provisions that do not comply with international human rights norms and standards.
- A post-conflict state is conducting long-term reforms of its entire criminal law framework (including its criminal code, criminal procedure code, prisons legislation, and police legislation) with a view to overhauling and modernizing it and wants to ensure that that legislation complies with international human rights norms and standards.
- Because of deficiencies in a certain segment of its criminal laws, a post-conflict state is drafting a transitional law (for example, a transitional code of criminal procedure) pending more long-term and substantial reforms.
- A post-conflict state has decided to update its criminal laws to adequately protect the rights of women and children, who have been deemed to be vulnerable groups in their society. The existing laws do not adequately address trafficking in persons and sexual offenses, which are being widely perpetrated.

- A post-conflict state that has decided to ratify the Rome Statute of the International Criminal Court is amending its existing legislation and procedures to comply with the various obligations arising from the statute (the introduction of the criminal offenses of genocide, crimes against humanity, and war crimes, for instance).
- A post-conflict state wishes to establish a new special chamber, tribunal, or court to deal with a specific crime problem (for instance, economic crimes, drug crimes, or organized crime) and needs to draft enabling legislation and the substantive and procedural provisions of law that the tribunal will apply.

Updating Existing Criminal Laws to Include New Criminal Offenses and Investigative Tools

With its justice system shattered after years of conflict, State A is experiencing unprecedented crime problems. Organized crime is rampant. Criminal gangs are involved in everything from money laundering to the trafficking of women from neighboring states to the smuggling of weapons, cars, and drugs over the state's porous borders. The police are well aware of these activities but are unable to effectively combat them because organized crime, money laundering, and trafficking are not offenses set out in the existing penal code, or because existing provisions are inadequate. Even if domestic law contained adequate criminal offenses to cover the conduct of organized criminal gangs, the police and the prosecutorial service would have difficulties investigating these offenses. For example, prosecuting a member of an organized criminal gang involves heavy reliance on witness testimony, but witnesses in trafficking or organized crime cases are often afraid to testify, fearing retribution from criminal gangs. The laws of State A do not have a mechanism for petitioning the courts for protective measures for witnesses. It is also difficult to gather evidence without sufficient means of surveillance—a common tool in investigating organized criminal activities—which is also not provided for in the law.

The scenario outlined above is commonplace in many post-conflict states. The Model Codes help in a number of respects. First, State A needs to enact new laws that make organized crime, trafficking in persons, money laundering, and smuggling criminal offenses; all these offenses are defined in the MCC. The commentaries to the provisions on these offenses contain discussions on other amendments to the law or other institutional arrangements required to effectively combat these crimes. For example, in the case of money laundering, it is essential to make amendments to other bodies of law, such as domestic banking law. Furthermore, the commentaries discuss other practical issues of implementation, such as the setting up of special task forces or special police units to tackle specific serious crimes. The commentaries further highlight the resource implications inherent in enacting such provisions.

State A also needs to modify its criminal procedure law to provide police with adequate investigative powers and tools and to provide adequate witness protection and confidentiality. Such measures hold the potential for impinging on the rights of a suspect or an accused, however, and require a delicate balancing act between these two imperatives. Many experts from dozens of countries were consulted to ensure that the

Model Codes strike this balance and provide sufficient guidance to criminal justice actors who may apply these provisions of the MCC.

Amending Laws to Comply with International Human Rights Norms and Standards

State B is emerging from a long conflict. Its laws date back to the nineteenth century, preceding the promulgation of international and regional human rights treaties and standards. The transitional legislative assembly wishes to amend its penal code, criminal procedure code, police laws, and prisons laws to comply with human rights standards.

The Model Codes can potentially save the drafters of new laws in State B from having to start from scratch in this process—a process that is both lengthy and research intensive. Drafting the Model Codes involved extensive research to ascertain applicable international human rights norms and standards in the sphere of criminal justice and to translate these standards into concrete provisions of law. In addition, accompanying commentaries discuss relevant human rights norms and standards in greater detail.

Suppose State B wishes to incorporate provisions on the right to challenge the lawfulness of detention (as enshrined in major international and regional human rights treaties). It must implement legal provisions to make the realization of this right practical and effective. In this scenario, it is not enough to include a broad and general principle on this right; a concrete mechanism must be created. In most states, this right is realized through the mechanism of habeas corpus or *amparo*, whereby a person challenges the legality of an arrest or detention. The Model Code of Criminal Procedure contains a number of provisions establishing a habeas corpus procedure to enable a person to challenge the lawfulness of his or her detention. These provisions may prove useful to those involved in reform of State B's laws.

Creating New Transitional Laws

Laws in State C are sparse. Rather than addressing the needs of the local population and the protection of their rights, the few laws that exist are geared solely toward the criminalization of behavior that was deemed subversive and threatening to the power of the former ruling regime. Prior to the conflict, the military acted as the police force, without reference to any laws. In the aftermath of the conflict, the authorities plan to reform and resize the military and develop a newly trained civilian police force. The authorities face a huge problem: the laws that exist are completely inappropriate for continued application. These laws provide no guidance on what standards and procedures should be followed in the investigation of offenses and the maintenance of public order. The laws contain a few provisions on criminal offenses but do not cover all the criminal conduct currently being perpetrated in State C. The legislative authority has decided to convene a judicial reform commission to enact a provisional criminal code, procedure code, laws on police, and laws on prisons.

The criminal legislation of State D is so closely associated with the prior dictatorial regime that it is politically and popularly discredited. Under public pressure, the legislative assembly in State D has decided to create a provisional penal code and criminal

procedure code that will apply until the state possesses the resources to completely overhaul the criminal justice system. The decision is made to create a rudimentary yet viable system of justice that protects the rights of accused persons while dealing with current crime problems. New offenses such as trafficking and smuggling will need to be added to the catalog of offenses contained in the new provisional penal code. Moreover, there is pressure in State D to get the provisional codes drafted and promulgated quickly.

Creating a body of law from scratch is a huge task: definitions of offenses need to be included, general principles of criminal law need to be drafted, and jurisdictional issues need to be addressed, as do issues related to penalties. Detailed procedures on basic investigative functions such as arrest, search of persons, and search of property need to be introduced. Provisions on detention of persons, both before trial and after conviction, need to be addressed, and relevant international standards must be incorporated into legislation. Public order powers may also need particular attention—for example, What procedures should the police follow in the use of force? When can police set up a roadblock? How should officers police public gatherings? Even if only rudimentary procedures and laws are introduced, there are still huge issues to be addressed.

Given that the Model Codes address all aspects of the justice system—criminal law and procedure, police and public order powers, and prisons standards—they may be a useful tool from which to borrow extensively in drafting provisional laws.

Amending Laws to Adequately Protect Vulnerable Groups

State E is currently experiencing an unprecedented rise in crimes committed against children. The criminal justice system has been greatly weakened by conflict. A legal vacuum, in which criminal elements operate freely, has emerged. Many criminal elements have targeted orphaned children for exploitation. Some of these children have been trafficked out of State E and sold into slavery in other states. Inside State E, many children are being forced into prostitution and used in a child pornography ring. The laws of State E do not contain any offense of child pornography. Nor do they contain the criminal offenses of trafficking in persons or sale of children. State E has laws on prostitution, but they criminalize the person being prostituted rather than the person forcing someone to engage in prostitution. The transitional government in State E is determined to tackle these crime problems.

In addition to removing the domestic provision of law that penalizes children for being prostitutes, State E needs to significantly augment its penal law to include activities such as child pornography, trafficking in children, sale of children, and child prostitution. The MCC contains a chapter on offenses against children that draws upon definitions of offenses contained in pertinent UN conventions.

The law of State F, a state just emerging from conflict, has never adequately addressed criminal offenses against women. Rape was widespread during the conflict and is still widely perpetrated. Sexual slavery is also common. Levels of domestic violence have risen dramatically since the cessation of the conflict. In consultation with local women's groups, the transitional government is seeking to implement a more expansive definition of crimes against women.

Many post-conflict states are deficient in their laws on offenses against women. Often, laws are outdated; definitions have never been introduced or have not been updated to keep pace with modern criminal law standards. Crimes against women, particularly crimes of sexual violence, are a common feature of conflict and often do not stop once a conflict stops. In fact, some post-conflict states have registered an increase in crimes against women in the aftermath of conflict. Many post-conflict states have moved to reform their laws to criminalize acts of violence against women.

The Model Codes may be useful in this sort of law reform process. First, they provide definitions of the criminal offenses of rape, sexual slavery, and domestic violence. In addition, the Model Code of Criminal Procedure contains specific evidentiary rules that protect the victims of sexual violence, in addition to other protection measures for victims testifying at trial. The commentaries to the codes are a key tool in that they provide broader policy recommendations on dealing with criminal offenses such as domestic violence and point to other initiatives, legal and otherwise (such as protection orders), that need to be brought into effect to adequately address the problem.

Amending Laws to Comply with the Rome Statute of the International Criminal Court

In State G, massive violations of international humanitarian law and international criminal law occurred during the course of a long-running conflict. Both crimes against humanity and war crimes were perpetrated on a large scale. State G is a party to the Rome Statute of the International Criminal Court and, after consultation with its civil society, has decided to prosecute these offenses through its domestic criminal justice system. State G's penal code, however, contains no provisions on crimes against humanity or war crimes. State G knows that, in accordance with Article 17(2) of the Rome Statute, it must ensure that the relevant substantive and procedural laws under which these crimes will be prosecuted comport with "general principles of due process recognized by international law."

The Model Codes may be a source of inspiration for State G. The integration of the substantive offenses of crimes against humanity and war crimes is not a huge task. The Rome Statute, combined with the document entitled *Elements of Crimes* that accompanies the statute, will be sufficient to provide provisions that the state's legislative authority can enact. But cleaning up State G's laws to comply with the "general principles of due process recognized by international law" will be more complicated. The Rome Statute of the International Criminal Court does not set out sufficiently clear guidelines on what is meant by this clause, although it has been interpreted to mean both binding and nonbinding international and regional instruments relating to international human rights standards.

In addition, other requirements of the Rome Statute need to be included in domestic legislation (for example, "command responsibility" as a ground of criminal liability). The Model Codes fully comply with the obligations on states parties to the Rome Statute. The relevant legal provisions have been included in the codes. The accompanying commentaries offer explanatory notes on the provisions and Rome Statute requirements.

Creating a Special Tribunal to Address Specific Crime Problems

State H has experienced significant organized crime problems, including human and drug trafficking. Instead of prosecuting the crimes through its ordinary criminal justice system, it has decided to set up a special tribunal to prosecute these crimes. It has decided to draft a new set of laws that will apply solely to the special tribunal.

In creating the laws and procedures that will apply to the special tribunal, and to persons detained or imprisoned by the tribunal, State H may look to the Model Codes to ensure that the laws of the special tribunal comply with international human rights norms and standards. The MCC may prove a useful source for the drafting of a statute of the special tribunal, which would need to include provisions on issues such as jurisdiction, statutes of limitation, *ne bis in idem* (double jeopardy), criminal participation, grounds of criminal liability, defenses, and penalties. The Model Detention Act may provide a useful framework for developing a law relating to persons detained and imprisoned by the special tribunal.

* * *

The scenarios presented above illustrate some of the ways in which the Model Codes can be used as a tool for post-conflict criminal law reform. There are, of course, many other ways in which the codes could be useful to a state, whether it wishes to replace or add one provision of law or to overhaul its complete criminal law framework. Many of the examples sketched above are not mutually exclusive; a state usually has more than one purpose in reforming its criminal laws. For example, a state may wish both to combat serious crimes problems and to ensure that its laws comply with international human rights standards and protect the rights of vulnerable groups.

While the Model Codes have been drafted specifically for use in a post-conflict environment, they may be equally usefully employed in the context of a developing state or state in transition that is reforming its criminal law framework. Indeed, the potential use of the Model Codes in these contexts was frequently suggested by the experts who reviewed the codes, particularly those from developing or transitional states who saw how the codes could be employed in criminal law reform efforts in their home states.

Chapter 3

A Synopsis of the Model Code of Criminal Procedure

The Model Code of Criminal Procedure (MCCP) provides model provisions that may prove useful to those updating or revising the domestic criminal procedure law in a post-conflict state. The provisions of the MCCP address all aspects of criminal procedure from investigation through to arrest, trial, and appeal of a criminal case, and include provisions on the investigation and prosecution of crimes with a transnational element.

One of the most frequently asked questions during the process of expert consultation on the Model Codes was whether the MCCP is a common law code or a civil law code. The MCCP—like the other codes in this series—is in fact neither one nor the other but a hybrid of systems. The MCCP blends different elements of domestic criminal procedure law from around the world with international norms and standards relevant to criminal procedure. The drafters drew on international human rights law for baseline fair trial and due process standards, and on international criminal law (in particular, treaties and conventions targeting transnational crimes such as organized crime, drugs offenses, and trafficking in persons) for standards and practices national authorities can employ in combating serious crimes. The drafters' ultimate aim was to balance respect for the fair trial and due process rights of suspects and accused persons with the need to address serious crimes problems plaguing post-conflict states.

The MCCP grew significantly in size over the course of the Model Codes Project, largely in response to requests from experts that the code provide comprehensive provisions on all aspects of criminal procedure law, ranging from search and seizure to the investigation of complex cybercrimes, witness protection measures, and victim protection. Many experts also recommended that the MCCP provide more detail in its provisions than that normally provided in a criminal procedure code. In some instances, this suggestion was sparked by concerns that a post-conflict criminal justice system may include personnel unfamiliar with international norms and standards who would appreciate additional legislative guidance in the execution of criminal procedure measures. Other experts were concerned that standard operating procedures or implementing regulations that are usually drafted to accompany a domestic criminal procedure code may be absent in a post-conflict state and that it would thus be

useful if the M CCP combined criminal procedure provisions and standard operating procedures.

The Model Code of Criminal Procedure

Chapter 1: General Provisions

Chapter 1 contains a preliminary list of definitions that are applicable throughout the M CCP. It also sets out the purposes and scope of the M CCP.

Chapter 2: Courts, Court Administration, and Provisions Relating to Court Proceedings

Because the M CCP was drafted outside of the context of a domestic criminal justice system, it was necessary to develop a skeletal criminal justice system to apply its provisions. Chapter 2 elaborates a criminal justice system consisting of trial courts and one appeals court, with a president, vice president, registries, and court staff. It provides details on the structure of trial courts and the appeals court and principles of judicial independence and judicial impartiality relevant to judges in this fictitious justice system. In addition, Chapter 2 sets out various administrative matters such as filing submissions before the court, the service of documents, serving summonses, maintaining court records, changes in the location of court proceedings, and control of court proceedings (contempt of court and other sanctions).

Chapter 3: Other Actors in Criminal Proceedings

Chapter 2 sets out a skeletal court system. Chapter 3, as a complement, expands upon the role of other actors in the broader criminal justice system. Chapter 3 starts out by providing a framework for the operation of a prosecution service, including provisions relevant to prosecutorial independence and impartiality, and creation of a defense service as a mechanism to provide legal assistance to persons who cannot afford their own counsel. The chapter concludes by setting out the duties and powers of the police—who, under the M CCP, work under the direction of the prosecutor—in the realm of criminal procedure.

Chapter 4: Rights of the Suspect and the Accused

Drawing upon relevant standards contained in international and regional human rights treaties and jurisprudence, Chapter 4 lays out a comprehensive list of fair trial rights that should be afforded to a suspect and an accused in the course of criminal proceedings. In addition to the items on this list, other fair trial rights are integrated throughout the M CCP as they relate to specific junctures in the criminal proceedings such as arrest and trial. Chapter 4 divides fair trial rights into general fair trial rights and those rights that specifically relate to legal assistance to the suspect and the accused.

Chapter 5: Victims in Criminal Proceedings

The extent of the involvement of victims in criminal proceedings varies from state to state. In some states, victims have extensive rights such as the right to mount a “private prosecution” against the alleged perpetrator of a criminal offense. In other states, a victim has much less active involvement in criminal proceedings (perhaps acting only as a witness at trial). The MCCP adopts a position between these two options. Chapter 5, drawing upon international and domestic standards on victims, sets out an array of provisions that protect the interests of victims in criminal proceedings and that allow victims to be informed of and, if appropriate, to participate in criminal proceedings.

Chapter 6: Criminal Proceedings against a Legal Person

Under the MCC, criminal liability may be asserted over legal persons (such as companies or corporations). In order to investigate and prosecute a legal person, who does not have human identity and therefore cannot “personally” take part in proceedings, a number of procedural measures are required. Chapter 6 of the MCCP contains provisions on appointing a representative for a legal person during criminal proceedings on how to serve documents on a legal person, on how a legal person should be charged in an indictment, and so forth.

Chapter 7: Provisions Relevant to All Stages of the Criminal Proceedings

Chapter 7 is an omnibus provision that addresses a number of different issues that are applicable at all stages of the criminal proceedings. The first issue addressed in Chapter 7 is “proceedings on admission of criminal responsibility,” which in many systems is known as “entering a guilty plea.” Chapter 7 then addresses the variation of time limits set out in the MCCP. Finally, the chapter sets out the procedure to be followed when the court, the prosecutor, or the defense seeks to enquire into the mental capacity of a suspect or an accused and assess whether he or she is fit to stand trial.

Chapter 8: Investigation of a Criminal Offense

Chapter 8 provides an array of provisions dealing with the investigation of a criminal offense. Part 1 of Chapter 8 addresses the role of the prosecutor and the police in the criminal investigation. It sets out the steps to be followed by the police and the prosecutor in conducting an initial investigation prior to the formal commencement of an investigation; it elaborates on the procedure and standards for initiating, suspending, or discontinuing a criminal investigation; and it includes provisions on the involvement of the victim during the investigation and the victim’s right to appeal actions of the prosecutor in certain instances.

Part 2 of Chapter 8 contains a variety of requirements with regard to the recording of actions taken in the course of the criminal investigation. It requires that any investigative action be recorded and sets out detailed requirements on the recording of the questioning of suspects and other persons.

Part 3 deals with the collection of evidence. It first offers detailed guidelines and requirements on the questioning of persons and then sets out a variety of investigative tools that can be employed by the police and the prosecutor to investigate a criminal offense. These tools include provisional detention of persons at the scene of a crime; fingerprinting and photographing; search and seizure (including search of persons, premises, dwellings, vehicles, and computers and seizure of property); preservation of property and freezing of suspicious transactions; seizure of the proceeds of crime or property used in or destined for use in a criminal offense; covert or other technical measures of surveillance or investigation; the use of expert witnesses; forensic investigative measures (including physical examination of a suspect; DNA analysis; examination of the mental state of a suspect; autopsy and exhumation); and unique investigative opportunities (which provides a mechanism to record testimony of a witness who will not be available at trial).

Part 4 of Chapter 8 provides additional tools that may be used in the investigation of a criminal offense. These include measures that allow for the protection of vulnerable witnesses or witnesses under threat and, in exceptional cases, anonymity of witnesses under threat; they also include provisions regarding “cooperative witnesses” (also known as “collaborators of justice”), which allow a person suspected of a criminal offense to exchange his or her testimony at the trial of an accused person for immunity from a particular criminal offense or offenses (this does not apply to the perpetrators of very serious criminal offenses such as genocide, crimes against humanity, and war crimes).

Chapter 9: Arrest and Detention

Part 1 of Chapter 9 clarifies the standards that must be adhered to in the arrest of a person. The standards relevant to arrest without a warrant and arrest under warrant are set out in detail, as are the procedures for arresting a person and informing the person of his or her rights upon arrest and for questioning and detaining an arrested person. Part 2 of Chapter 9 requires that the arrested person must be brought before a judge for a review of arrest, and at that juncture the prosecutor may apply to the court to impose pretrial detention, bail, or “restrictive measures other than detention” upon the arrested person (although the prosecutor also has the power to apply for these measures at a later stage also).

Part 3 of Chapter 9 lays out the various standards for the granting of a motion for detention, bail, and restrictive measures other than detention. It also provides for a procedure for the oversight of detention of a person prior to trial; that procedure requires that a person be detained only upon the application of the prosecutor at three-month intervals and that the detained person may make an interlocutory appeal to the appeals court to challenge the legality or validity of pretrial detention. In order to avoid excessive pretrial detention—a common phenomenon in many post-conflict states—the MCCP puts the burden on the prosecutor to justify the continued detention and to show the court that the prosecutor is diligently pursuing the case. To this end, Part 3 of Chapter 9 also sets out maximum time limits for pretrial detention and detention during trial.

Chapter 10: Indictment, Disclosure of Evidence, and Pretrial Motions

Under the MCCP, once a criminal investigation has been completed, the prosecutor must present an indictment to the competent trial court whereupon the court must schedule a confirmation hearing to determine whether there are sufficient grounds upon which to proceed to trial. Where the indictment is confirmed, the “suspect” officially becomes the “accused” and a trial is scheduled. In addition to providing the mechanism for holding the confirmation hearing, Chapter 10 sets out a disclosure regime to be implemented after the confirmation hearing and prior to the trial under which the prosecutor must provide the defense with relevant incriminating and exonerating evidence and the names of any witnesses that it will call at trial. In turn, the defense must provide the names of witnesses it intends to call at trial and must disclose if it intends to enter a defense at trial or to allege an alibi. The final part of Chapter 10 allows for the determination of preliminary motions leading up to the trial.

Chapter 11: Trial of an Accused

Chapter 11 regulates the trial of an accused. Parts 1 and 2 of Chapter 11 set out the general provisions on trials, the trial procedure and the order of presentation of evidence and witnesses. Part 3 of Chapter 11 contains detailed rules of evidence, providing general provisions on the inclusion of evidence and describing situations where evidence must be excluded. Part 4 addresses the issue of witness testimony and regulates who may testify, the solemn declaration of a witness, the consequences of not appearing before the court, the principles of live and direct testimony, the presentation of prior evidence to the witness, witness impeachment, and the protection of witnesses. Part 6 elaborates a process for the deliberation of the trial court and the pronouncement of the judgment. Where a person is found to be criminally responsible (i.e., guilty), Part 7 details the separate penalties hearing that must be scheduled to determine what penalties or orders to impose upon the convicted person. The remainder of Chapter 11 addresses the execution of penalties and orders and the judicial supervision of imprisonment; it also provides a mechanism and broad guidelines on the conditional release of a convicted and imprisoned person who has served part of his or her sentence.

Chapter 12: Appeals and Extraordinary Legal Remedy

Chapter 12 provides an appeal mechanism by which a final conviction or acquittal may be challenged on the grounds of an error of law or an error of fact or on the penalty imposed or ordered upon the convicted person. Once a judgment of the trial court has been released, the parties have a limited time to lodge an appeal statement with the appeals court. Once an appeal is lodged, the opposing party is given the opportunity to file a cross-appeal, after which an appeal hearing is scheduled by the appeals court. Under the MCCP, the appeals court hears both sides’ arguments and may, at its discretion, allow the introduction of evidence or the hearing of witnesses; however, unlike in some states, the appeal does not involve a full retrial of the case. After the hearing and

its deliberations, the appeals court may reverse or amend the judgment of the trial court or order a retrial.

Unlike an appeal, which involves the parties challenging a judgment that is not yet final, an “extraordinary legal remedy” consists of an application to the court to reopen criminal proceedings that are final. An application for an extraordinary legal remedy is based on the discovery of new evidence that was not available at trial and which might have influenced the outcome at trial or on the discovery of new facts that prove that there was a substantial violation of the MCCP. The appeals court, in determining an application for an extraordinary legal remedy, must first conduct a preliminary determination of whether the application has merit, whereupon it may order the hearing of the application either by the trial court or the appeals court. The trial court or the appeals court may reverse, amend, or affirm the original judgment of the trial court.

The final section of Chapter 12 allows for interlocutory appeals or appeals prior to the final verdict being delivered at trial. The MCCP sets out a finite list of different decisions or orders of the court that may be appealed through this mechanism.

Chapter 13: Confiscation

The MCC provides for the confiscation, first, of property used in or destined for use in a criminal offense and, second, for the proceeds of crime. Chapter 13 provides procedural provisions that regulate the confiscation of property or proceeds, including the rights of third parties who have a legal claim to property or other items that are the subject of a confiscation order.

Chapter 14: Mutual Legal Assistance and Extradition

Mutual legal assistance refers to the provision of legal assistance by one state to another state in the investigation, prosecution, or punishment of criminal offenses—for example, the taking of evidence from persons or the execution of a search of premises in the requested state. Part 1 of Chapter 14 sets out the legal framework (which can be applied absent a mutual legal assistance treaty or in place of an existing treaty) for the receipt of requests for mutual legal assistance from another state, for the determination of the request by court, and, where appropriate, for the execution of requests for mutual legal assistance.

Part 2 covers extradition, which is the formal process by which a person in one state can be sent to another state to be tried or to serve a sentence. Part 2 provides the legislative basis for extradition where no treaty exists. It details the extradition procedure, the extradition hearing, and the surrender of a person where extradition is approved.

Chapter 15: Juvenile Justice

Under the MCCP, a juvenile is a child between the age of twelve and eighteen years of age. International human rights law and domestic best practice standards in the field of criminal justice require that a juvenile who comes into contact with the criminal justice system receive greater protections than those accorded to adults. Chapter 15 sets out the range of rights that juveniles (in addition to those provided to adult sus-

pects and accused persons) are entitled to in the course of criminal proceedings. In addition, Chapter 15 establishes Special Panels for Juveniles to determine all matters relating to juveniles and provides guiding principles that the panels should take into account in their determination.

Chapter 16: Right to Review the Legality of Any Deprivation of Liberty

In some states, the right to review the legality of any detention exists in legislation outside of a criminal procedure code; however, for the purposes of the MCCC and to ensure that a mechanism to challenge the legality of detention exists within the framework of the Model Codes, this right has been integrated into the MCCC. Chapter 16 applies not only to the review of the legality of detention by way of arrest or other forms of detention sanctioned under the MCCC but also to all forms of detention that a person may be placed under by the police or the prosecutor. It establishes a habeas corpus mechanism by which a person who has been detained or another person representing the interests of detained person may file a motion with a court to contest the legality of his or her detention. The court must first make a preliminary assessment of the motion and assess whether it is a bona fide claim. If it is a bona fide claim, the competent judge is required to convene a habeas corpus hearing to examine the legality of the detention. Where a person has been illegally detained, the MCCC provides for his or her immediate release and an investigation into the circumstances surrounding the detention.

Chapter 17: Right to Compensation for Unlawful Deprivation of Liberty or Miscarriage of Justice

A person who has been unlawfully deprived of his or her liberty or a person whose conviction for a criminal offense represented a miscarriage of justice is entitled under international human rights law to compensation. Chapter 17 of the MCCC requires that the competent legislative authority establish an appropriate mechanism to give effect to this right.

Chapter 4

Guiding Principles for the Criminal Law Reform Process

Reforming criminal laws in any state is a time-consuming, intensive, and laborious process, requiring institutions and individuals with the requisite skills, expertise, and resources, as well as political will. Often, law reform efforts focus more on the final products than on the process by which laws are drafted. It is a mistake, however, to disregard the modalities of the law reform process as irrelevant. The process is integral to determining whether new laws are viable, practicable, and acceptable both to the general population and to the criminal justice community in the post-conflict state that is expected to apply the laws.

During the preparation of the Model Codes, in-depth research was conducted on the law reform process in post-conflict states, including extensive interviews with both national and international actors involved in past reform efforts. What follows is a summary of key recommendations for future processes, distilled into eight guiding principles.

1. Assess the existing laws and criminal justice system

The first step in law reform should be to assess both the applicable legal framework and the criminal justice system. This point may seem self-evident, but it is not uncommon in post-conflict states for law reform actors to draft a new law without even checking to see if a law on the same subject already exists.

Assessment of the legal framework involves gathering all applicable laws, which may include the state's constitution, legal codes, legislation, regulations, bylaws, standard operating procedures, relevant and binding precedents, and even executive or presidential edicts or decrees. (For a discussion of exactly what constitutes a state's legal framework, see chapter 3 of Colette Rausch, ed., *Combating Serious Crimes in Postconflict Societies: A Handbook for Policymakers and Practitioners*, published by the United States Institute of Peace.) This task can be far more challenging than one might expect, either because some post-conflict states possess a multitude of contradictory bodies of applicable law or because copies of the existing laws are simply very hard to

find (in some instances, researchers have had to look abroad to find a copy of a country's laws). The assessment of the criminal justice system should focus not on the law on paper but on the law in action. Investigators should determine how the criminal justice system is, or is not, functioning in the implementation and application of domestic criminal laws. As part of this effort, it is important to ascertain the types of crimes prevalent in the post-conflict state, so that the legal framework and the criminal justice system can be assessed in light of their respective abilities to tackle current crime problems; this assessment will help to identify which provisions need to be repealed, amended, or replaced and which new provisions need to be added. New provisions are often needed to ensure compliance with international human rights or criminal law treaties to which the state is a signatory. (See the section "Further Reading and Resources" in this volume for a list of those treaties.)

The Criminal Justice Reform Unit of the United Nations Office on Drugs and Crime has created a standardized and cross-referenced set of assessment tools for conducting a criminal justice assessment. The Criminal Justice Assessment Toolkit is designed for use both by UN agencies and by outside organizations and governments. Grouped by criminal justice system sectors (police, justice, and prisons), each tool provides a practical and detailed guide to the key issues to be examined and the relevant standards and norms. The toolkit is designed to be used around the world and with a variety of legal traditions and is particularly useful for countries undergoing transition or post-conflict reconstruction. (For details, see "Further Reading and Resources.")

All relevant actors—for instance, government institutions, national bar associations, faculty members of national law schools, non-governmental and international organizations that have been monitoring human rights abuses, and international legal experts—should be invited to contribute their perspectives on gaps and deficiencies in the legal framework and other impediments to enforcing criminal justice. It is also important to find out attitudes among the local public. Such sociological investigations can be conducted through a variety of means, including holding public meetings or organizing a campaign to solicit written opinions. (See also Principle 6, below.)

In evaluating the effectiveness of the existing legal framework and criminal justice system, it is important to be aware of any customary, nonstate, or traditional systems of justice that may exist in the country and to assess their role in the post-conflict state and their relationship to the state-run criminal justice system.

2. Criminal law reform is a holistic enterprise: a change to one part of the law may have side-effects in other parts of the law

Law reform actors must decide whether to work with the law as it is and postpone reform until a comprehensive program of reform can be conducted or engage in a small-scale reform process by pressing ahead immediately with ad hoc and minor reforms to specific elements of the law or reform of discrete segments of the legal framework (in hopes, perhaps, of a more holistic reform being conducted subsequently). Such small-scale, or targeted, reforms are often essential in post-conflict states (for instance, they may be necessary to deal with a particular crime problem that

is plaguing the state and is not adequately addressed by existing laws) and, indeed, are conducted on an ongoing basis in many states around the world. However, in a post-conflict context, where the entire criminal law framework is often grossly inadequate, a more holistic reform process may be required in order to be effective. This process should address all criminal law in the state, including the criminal code, the criminal procedure code, prison laws, and provisions governing police activities.

Where actors choose the small-scale, or targeted, option, they should recognize that making a change in one area of the law usually has side-effects in other areas of the law. In amending existing provisions of law or adding new provisions, reform actors should assess the relationship between new, amended, and existing provisions across the criminal justice continuum and the broader legal framework. For example, changes to criminal procedure laws may have implications for laws on police powers or laws on detention; changes in the criminal code, such as the addition of new criminal offenses, may require changes in criminal procedure laws. The commentary to many provisions in the Model Codes points out the linkage to other provisions elsewhere in the codes that would require a coordinated approach of this sort.

3. Coordination of reform efforts is often best entrusted to a single, independent body

Many states have a dedicated, permanent, and independent law reform commission or body tasked with studying existing domestic laws with a view to their systematic development and reform. Law reform commissions have worked effectively and dynamically in many states, providing policy advice to governments or legislatures on areas of law in need of reform or drafting legal provisions or larger pieces of legislation. Where they are independent, impartial, and have the ability to undertake an open, transparent, and inclusive process, law reform commissions are often considered good vehicles to drive fair and effective reform efforts.

If the decision is made to establish a permanent law reform commission in a post-conflict state, a variety of factors need to be considered. For example, new legislation needs to be drafted to establish the commission; budgetary, staffing, and operational plans have to be developed; and provision must be made for the full financing, housing, and outfitting of the commission. Strategic plans should set out the fundamental principles underpinning reform efforts (e.g., openness, inclusiveness, responsiveness, and multidisciplinary approaches) and determine the process by which the law reform commission will undertake its work. A secretariat and a research component of the law reform commission need to be established and staffed, and commissioners need to be appointed.

Where small-scale, rather than large-scale, reform efforts are undertaken in a post-conflict state, the task of coordination may be performed by an ad hoc, non-permanent working group focused on priority law reform in the immediate term. Such an arrangement requires adequate financial support, often including provision for a dedicated secretariat and a research component. Such a working group should be independent, impartial, and adhere to the same fundamental principles as a full-time law reform commission.

4. Set realistic time frames for large-scale reform efforts; expect the process to take years, not months

Given the inadequacies of domestic legislation in some post-conflict states, the urge to push ahead quickly with large-scale reform is perfectly understandable. But such urgency can lead to laws being drafted so hastily that when put into practice, they prove to be unworkable.

Large-scale law reform is an intensive and complex endeavor that requires time—often, five to ten years in the case of a functioning, peacetime legal system to conduct effectively. Post-conflict states that set deadlines of a few months or, at most, a few years for the completion of the entire reform process ignore this fact and, typically, pay the consequences. Given the length of time required, it is essential to prioritize the areas in need of reform and work on the most important first.

5. Examine other legal models but take care if engaging in transplantation of laws from one state to another

The transplantation of legal provisions from one legal system to another is not uncommon. Legal drafting frequently involves reference to other models, which can save the drafter from having to reinvent the wheel. The key to whether or not a transplant will be successful, however, is process. Among other factors, careful consideration must be given to local conditions and culture, and recourse should be had to a range of different legal models that could potentially be used. Foreign sources of law used in drafting new laws will likely require adaptation for use in the new context.

6. The process should be as broad and inclusive as possible

It is important to seek input from a wide range of criminal justice actors: police officers, judges, lawyers, paralegals, prosecutors, prison officials, court administrators, the staff of civil society organizations and victims' groups that focus on criminal justice issues, law professors, and so forth. Some of these actors should have a general knowledge of criminal laws and procedures, police laws, and prison laws, while others should be experts in specific areas such as organized crime or human rights. Many law reform bodies or commissions also engage the services of experts from different disciplines, including sociologists, anthropologists, political scientists, and psychologists.

7. Calculate the resource and financial implications of law reforms

Some new criminal laws have significant resource implications. For example, new laws on witness protection may require evidence to be given remotely or videotaped in advance; implementation of new provisions on covert surveillance measures may require the purchase of sophisticated electronic equipment; new laws on prisons may require substantial changes to prisoner registration systems and even infrastructural changes to prisons (such as the creation of separate facilities for juveniles). In some post-conflict states, new laws have not been implemented because of a lack of resources.

The resource implications of new laws should be considered both before and during the drafting process. Among other things, a financial analysis of the projected costs of proposed reforms must be undertaken to enable drafters to weigh the theoretical merits of a new law against its practical viability.

8. The law reform process does not end once laws have been enacted

Putting new laws on the books does not necessarily mean that those laws will be implemented. During and after the drafting and adoption of a new law, attention should be focused on its application. Perhaps the most important key to effective implementation is to ensure that criminal justice actors are aware of the new law and to train them in its provisions before they come into effect. Training institutes and universities will also need to adopt their curricula. It is also important to cultivate awareness of their new legal obligations and rights among the general population; public education campaigns are vital in this regard.

Some states have established oversight mechanisms for the implementation of new laws. In some states, a body originally tasked with reforming laws was transformed into implementation/oversight bodies to assess and oversee the application of new laws.

Model Code of Criminal Procedure

Chapter 1: General Provisions

Article 1: Definitions

1. *Accused* means a person against whom one or more counts in an indictment have been confirmed under Article 201.
2. *Application* means a written request made to a judge by a prosecutor or the police for the purpose of obtaining a warrant.
3. *Arrest* means the act of apprehending a person for the alleged commission of a criminal offense.
4. *Arrested person* means a person who has been apprehended for the alleged commission of a criminal offense.
5. *Child* means a person under the age of eighteen years.
6. *Competent* means possessing the power and legal authority to deal with a matter.
7. *Competent legislative authority* means the body with the authority to promulgate legislation in [insert name of state].
8. *Convicted person* means a person who has been tried and found criminally responsible by a trial court or the appeals court in a final court decision.
9. *Cross-examination* means the questioning of a witness by the party other than the direct examiner upon a matter that is within the scope of the direct examination of the witness.
10. *Day* means a calendar day, except when otherwise indicated as a working day in the M CCP.
11. *Defense* means the accused and counsel for the accused.
12. *Detainee* means a person deprived of his or her personal liberty, except as the result of conviction for a criminal offense.
13. *Detention* means the status of a person who is in custody.

14. *Detention authority* means the body responsible for the operation of detention centers in [insert name of state].
15. *Detention center* means a facility, authorized by law, where detainees and convicted persons are held.
16. *Direct examination* means the questioning of a witness by the party that calls the witness to testify before the court.
17. *Doctor* means a person who holds a degree in medicine at the university level and who holds a professional license or certification in [insert name of state] or in any other state.
18. *Document* means any physical embodiment of information or ideas.
19. *Evidence* includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved.
20. *Expert witness* means a witness qualified as an expert by his or her knowledge, skill, experience, training, or education in a particular area of scientific, technical, or other specialized knowledge.
21. *Forensic pathologist* means a medical doctor who holds a professional license or certification in forensic science in [insert name of state] or in any other state.
22. *Indictment* means the formal written accusation issued by the prosecutor against a suspect charged with a criminal offense.
23. *Interlocutory appeal* means an appeal under Article 295 that is heard prior to the final decision of a case.
24. *Investigation* means all activities conducted by the prosecutor or the police under the MCCP for the collection of information and evidence in a case.
25. *Jurisdiction* means the power to hear and determine a criminal proceeding.
26. *Juvenile* means a child between the ages of twelve and eighteen years.
27. *MCC* means Model Criminal Code.
28. *MCCP* means Model Code of Criminal Procedure.
29. *MDA* means Model Detention Act.
30. *MPPA* means Model Police Powers Act.
31. *Medical professional* means a person with specialized training and experience in one or more fields of health care, including but not limited to medicine, nursing, or emergency aid, and who holds a professional license or certification in such a field in [insert name of state] or any other state, such that the person is able properly to perform tasks relevant to such field or fields as specified in the MCCP.

32. *Motion* means a request made to the court by the prosecutor or the defense, and where applicable a witness or victim, for the purpose of obtaining an order in favor of the applicant.
33. *Nurse* means a person who holds a degree in nursing at the university level and who holds a professional license or certification in [insert name of state] or in any other state.
34. *Order* means an order of a court deciding on a measure that has been sought upon the motion of the prosecutor, the defense, and where applicable, a witness or victim.
35. *Premises* means any land or building.
36. *Probable cause* means an objectively justifiable and articulable suspicion that is based on specific facts and circumstances that it tends to show that a specific person may have committed a criminal offense.
37. *Psychiatrist* means a person who holds a degree in medicine at the university level and who holds a professional license or certification to practice psychiatry in [insert name of state] or in any other state.
38. *Psychologist* means a person who holds a degree in psychology at the university level and who holds a professional license or certification to practice psychology in [insert name of state] or in any other state.
39. *Public official* means:
 - (a) a person who holds a legislative, executive, administrative, or judicial office, whether appointed or elected, whether temporary or permanent, whether paid or unpaid, irrespective of the person's seniority;
 - (b) a person who performs a public function, including one for a public agency or public enterprise, or provides a public service as defined under the applicable law; or
 - (c) any other person defined as a public official under the applicable law.
40. *Reasonable suspicion* means evidence and information of such quality and reliability that they tend to show that a person may have committed a criminal offense.
41. *Relative* means any of the following:
 - (a) persons related to another by consanguinity (blood): a parent, a child, a brother, a sister, a grandparent, or a grandchild;
 - (b) persons related by affinity (marriage): a spouse, the child of a spouse, the mother or father of a spouse, the brother or sister of a spouse, the grandparent of a spouse, the grandchild of a spouse, the spouse of a child, the

- spouse of a parent, the spouse of a brother or sister, the spouse of a grandparent, or the spouse of a grandchild; and
- (c) persons related through adoption: an adopted parent, an adopted child, an adopted brother, an adopted sister, or the grandparent of an adopted child.
42. *State* includes an organized area or entity, such as an autonomous territory or a separate customs territory.
43. *Suspect* means a person against whom there exists a reasonable suspicion of his or her having committed a criminal offense.
44. *Territory* means the land, coastal seas, and water surfaces within the territory of [insert name of state], as well as the air space over these areas.
45. *Victim* means a person against whom a criminal offense has been committed. When a criminal offense is committed against a child, his or her parents or legal guardians are also classified as victims. Where the person against whom a criminal offense is committed is killed or incapacitated, his or her spouse, parent, child, brother, sister, grandparent, grandchild, adopted parent, adopted child, adopted brother, adopted sister, adopted grandparent, adopted grandchild, or foster parent is classified as a victim, except if that person is accused of the criminal offense.
46. *Warrant* means an order of the court issued upon the written application of the prosecutor or the police that empowers the police to undertake the measure sought in the application.
47. *Witness* means a person who is summonsed or has relevant knowledge and may be summonsed to testify before a court in the course of criminal proceedings.

Commentary

Paragraph 1: The terms *accused* and *suspect* are both used throughout the *Model Codes for Post-Conflict Criminal Justice* (hereafter, the Model Codes). A *suspect* is a person against whom there is a reasonable suspicion of him or her having committed a criminal offense, as defined in Paragraph 43. A *suspect* becomes an *accused* when an indictment against him or her is prepared, submitted to the court, and confirmed by it under Article 201 of the MCCC. After the confirmation of the indictment, the accused must stand trial before the court. Reference should be made to Articles 193–203 of the MCCC and their accompanying commentaries.

Paragraph 2: During the course of an investigation, the prosecutor or (in certain limited and defined circumstances) the police may make an *application* to the court to authorize certain investigatory actions, for example, a search of premises and dwell-

ings (Articles 118–121) or covert surveillance measures (Articles 134–140). Where the court approves an application, it will grant a *warrant*. A warrant is defined under Article 1(46)

Paragraph 3: The definition of *arrest* used in the MCCP has been taken from the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Use of Terms,” [a]). Reference should be made to Chapter 9, Part 1, on “Arrest,” and particularly to Article 170 (“Arrest without a Warrant”) and Article 171 (“Arrest under Warrant”), which set out the standards applicable to the arrest of a person. In some states, the term *arrest* means that the person is apprehended but not detained. The person may be notified that he or she is under arrest. The person may be prevented from leaving the scene temporarily, may be handcuffed, and may even be questioned at the scene of arrest in a police car, for example. However, in order for the person to be moved from the scene of arrest to a police station for questioning, a separate warrant for detention is required. In other systems, the term *arrest* is taken to mean that the person is apprehended and may also be detained beyond the point of apprehension. In these systems, detention and removal from the scene of arrest are implicit in the arrest warrant (subject, of course, to the time limits on detention contained in the criminal procedure law). The latter meaning of *arrest* is the one that was favored by the drafters of the MCCP. Thus, under the MCCP, the power to arrest a person under Article 170 or Article 171 is taken to mean that the police, once they have arrested a person, may take that person to the police station and may, for example, question the person pending the arrested person’s hearing before a judge under Article 175. Under Article 172(3)(f), an arrested person must be brought before a judge as soon as possible and no later than seventy-two hours after the moment of arrest. In order for detention to be legal after this time, a warrant for detention must be obtained from a judge under Chapter 9, Part 3, of the MCCP.

Paragraph 5: The definition of the term *child* as contained in Paragraph 2 is taken from Article 1 of the United Nations Convention on the Rights of the Child. It is important to stress the distinction between the terms *child* and *juvenile*, both of which are used throughout the Model Codes. A juvenile falls within the definition of a child (that is, he or she is under the age of eighteen years). However, the term *juvenile* has a distinct meaning for the purposes of asserting jurisdiction over the person. Under the MCC, a court may assert criminal jurisdiction over a juvenile, meaning a child over the age of twelve, but not over a child. Reference should be made to Article 7 of the MCC and its accompanying commentary, which deals with personal jurisdiction over juveniles.

International human rights norms and standards provide that a child (and by necessary implication a juvenile) who is involved in criminal proceedings not only should be afforded the same guarantees and protections as an adult but also is entitled to additional protections on account of his or her vulnerable status. Rule 2(2)(a) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice specifically provides that a juvenile is a person who is tried “in a manner which is different from an adult.” The protective legal framework aimed at safeguarding the rights of children consists of international conventions (e.g., the United Nations Convention

on the Rights of the Child and the African Charter on the Rights and Welfare of the Child) and a number of nonbinding instruments (e.g., the United Nations Standard Minimum Rules for the Administration of Juvenile Justice [the Beijing Rules], the United Nations Guidelines for the Protection of Juveniles Deprived of Their Liberty, and the United Nations Guidelines for the Prevention of Juvenile Delinquency [the Riyadh Guidelines]). The drafters of the Model Codes have sought to integrate these international norms and standards applicable to children into the codes' substantive provisions. Reference should be made to Section 14 of the MCC, on juvenile penalties, and Chapter 15 of the MCCP, which specifically deals with the procedural rights of juveniles involved in criminal proceedings.

Paragraph 7: The term *competent legislative authority* is used as a generic term throughout the MCCP to signify the relevant domestic state authority with the power to promulgate or adopt legislation. For example, Article 52 of the MCCP requires that the competent legislative authority establish a mechanism to provide for free legal assistance to an arrested person or an accused person who cannot afford his or her own lawyer. In some states, the competent legislative authority will be the parliament or legislature. In other states, the president may have the power to pass relevant legislation in the criminal sphere by way of presidential decree.

Paragraph 9: In some legal systems, a trial is predominantly led by the judge or panel of judges, who may also take the primary role in the questioning of witnesses before the court. A prosecutor and defense counsel may be present during the trial (in addition to a lawyer representing the victim); however, they may not take an active role in questioning the witness. In other legal systems, the proceedings are adversarial and party driven. Under this model, the prosecutor and the defense take the lead roles in the questioning of witnesses. Under such systems, the judge acts in a supervisory capacity. Depending on the particular legal system in question, the judge may question the witness once he or she has been questioned by the prosecutor and the defense. The judge may also have the discretion to call certain witnesses.

Under the MCCP, the trial is adversarial in nature with the prosecutor and defense being responsible for calling witnesses before the court and examining them. The judge may question a witness after he or she has been questioned by the prosecutor and the defense. Reference should be made to Article 224 and its accompanying commentaries. The form that the questioning of witnesses takes is also contained in Article 224. Paragraph 3 of Article 224 provides that a witness will be *directly examined* (the definition of *direct examination* is contained in Article 1[16]), then *cross-examined* (the definition of *cross-examination* is contained in Article 1[9]), then *reexamined*. A witness will be directly examined by the party that called him or her before the court (e.g., if the prosecutor calls a witness before the court, then the prosecutor will be responsible for directly examining this witness). The witness may then be cross-examined by the opposing party (e.g., if the prosecutor calls a witness before the court, the defense may cross-examine the witness after direct examination has been undertaken). The party conducting the cross-examination may only question the person in connection with matters raised by the party who has undertaken the direct examination (i.e., within the scope of direct examination). After cross-examination, the party who

called the witness has the opportunity to reexamine the witness in light of the cross-examination just undertaken.

Paragraph 10: The terms *day* and *working day* are used throughout the MCCP to distinguish between calendar days and working days. For example, under Article 99(2), the prosecutor has fifteen working days to notify a victim of his or her decision to initiate, suspend, or renew an investigation. In contrast, under Article 136(9), a warrant for covert or other technical measures of surveillance or investigation must not exceed sixty calendar days.

Paragraph 12: The definition of *detainee* is inspired by the definition of *detained person* contained in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (“Use of Terms,” [b]).

Paragraph 13: The term *detention* includes police detention, where a person has been arrested and is being detained by the police pending a hearing before a judge under Article 175, and detention pending trial, or *detention on remand*, as it is called in some legal systems.

Paragraph 15: The term *detention center* is used as a generic term throughout the MCCP to denote the facility where detainees and convicted persons are held. In some states, detainees and convicted persons are held in completely separate facilities: detainees may be initially held in police custody at the police station and then transferred to *jail* or a detention center for pretrial detainees; if convicted, a convicted person is placed in *prison*. This is the ideal scenario and one that is consistent with international human rights norms and standards (see, for example, Article 10[2][a] of the International Covenant on Civil and Political Rights: “Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons”). Often, given the limited resources available in most post-conflict states, detainees and convicted persons are held in the same facilities. In some instances, in order to comply with international human rights norms and standards, detainees and prisoners are kept separate from one another within the same facility.

Paragraph 16: Reference should be made to the commentary to Paragraph 9.

Paragraph 20: Reference should be made to Article 141 and its accompanying commentary on the appointment of expert witnesses.

Paragraph 21: Forensic pathology is a branch of medicine that determines the cause of death. Under Article 145(4) of the MCCP, the court may appoint a forensic pathologist to conduct an autopsy to determine how a victim died and to gather evidence that may be useful in the investigation and prosecution of an alleged perpetrator.

Many post-conflict states have a shortage not only of relevant criminal justice actors but also of other professionals such as forensic pathologists that are necessary to investigate a criminal offense. In East Timor, for example, because of the absence of forensic

pathology expertise, a forensic pathologist had to be flown in from Australia to assist in investigations. Many post-conflict states also lack pathology laboratories, where the evidence gathered by a forensic pathologist would be tested. Laboratory testing of forensic findings is crucial to the gathering of credible evidence in many criminal investigations, particularly in murder or rape cases. In some post-conflict states where there are no laboratories, evidence is sent to a laboratory outside of the state for testing; in post-conflict Kosovo, for example, evidence was sent to laboratories in Germany. In Liberia, through the efforts of international donors, a laboratory has been established in its capital, Monrovia, which precludes the need to send evidence out of the state.

Paragraph 22: Under the MCCP, upon the completion of a criminal investigation, if the prosecutor finds it appropriate to pursue the case, he or she must prepare a written indictment against the suspect. An indictment can take a number of different forms, but typically it contains the accusations against the suspect (listing the criminal offenses with which they are charged) and provides relevant facts relating to the alleged criminal offenses and the suspect's involvement. In order for the suspect to become an accused (see the discussion in the commentary to Paragraph 1), the written indictment must be presented to the court under Article 195 and confirmed under Article 201. Reference should be made to Chapter 10, Part 1, "The Indictment," and Chapter 10, Part 2, which provides the procedural rules for the presentation, hearing, and confirmation of an indictment.

Paragraph 23: An interlocutory appeal is an appeal that is heard by the appeals court prior to the final determination of criminal responsibility at trial. Only certain issues may be appealed to the appeals court prior to and during the trial. These recognized grounds of interlocutory appeal under the MCCP are set out in Article 295. Reference should be made to Article 295 and its accompanying commentary.

Paragraph 24: Reference should be made to Chapter 8, which deals with the investigation of a criminal offense.

Paragraph 26: Reference should be made to the commentary to Paragraph 5.

Paragraphs 27–30: The Model Criminal Code and the Model Code of Criminal Procedure make up volumes I and II, respectively, of the *Model Codes for Post-Conflict Criminal Justice* (hereafter, the Model Codes). The Model Codes are a set of four model codes published in three volumes. Volume III contains a Model Detention Act and a Model Police Powers Act. For a discussion of the origins, aims, and content of the Model Codes, see the User's Guide at the beginning of this volume.

Paragraph 31: Article 1 of the MCCP includes a definition of *doctor* (Paragraph 17) and *nurse* (Paragraph 33), in addition to *medical professional*. Specific mention of a doctor, nurse, and medical professional is made in Article 142, "Physical Examination of a Suspect or an Accused," and in Article 172 on the right of an arrested person to a medical examination. Ideally, a qualified doctor would conduct a physical or medical examination; however, in a post-conflict setting there may be a lack of qualified doc-

tors. For this reason, Articles 142 and 172 provide that a nurse, in place of a doctor, or a medical professional (where no qualified nurse is available) may conduct a physical or medical examination of a person.

Paragraph 32: A *motion* can be made to the court by either the prosecutor, the defense, a witness, or a victim (where applicable). A *warrant*, like a motion, is a petition to the court to take certain action; a warrant, however, can only be requested by and granted to the prosecutor or the police. If the court agrees with the motion filed, it will grant an *order*, as defined in Paragraph 34.

Paragraph 34: Reference should be made to the commentary accompanying Paragraph 32.

Paragraph 36: There are a number of different standards of proof provided for in the MCCP. The term *standard of proof* refers to the degree or level of proof required in a specific situation. The standard set out in Paragraph 36 is that of *probable cause*, which is employed in many legal systems around the world. In some systems, the term *grounded suspicion* is used instead. In the MCCP, and in many criminal procedure codes around the world, the probable cause standard is the standard of proof required in order to arrest a person (see Articles 170 and 171 of the MCCP) or to search a premises or a person (see Articles 118–125). Probable cause is a higher standard of proof than *reasonable suspicion*, which is contained in Article 1(40). Unlike reasonable suspicion (see the commentary to Paragraph 40), probable cause is wholly objective in nature and requires that such facts are present that would create a reasonable belief that a criminal offense had been committed; put differently, the probable cause standard requires that there are facts present that would convince a *reasonable person* or a *prudent person* that a criminal offense has been committed.

Under the MCCP, there are two further standards of proof: *the balance of probabilities* and *beyond reasonable doubt*. The latter is the highest standard of proof contained in the MCCP and is the one required to convict a person of a criminal offense. The balance of probabilities test is used at a confirmation hearing under Article 201. Reference should be made to Article 216 for a discussion of the *beyond reasonable doubt* standard and to Article 201 for the meaning of *the balance of probabilities*.

Paragraph 39: The definition of *public official* has been taken from Article 2(a) of the United Nations Convention against Corruption, currently the most comprehensive definition of public official in international and regional instruments.

Paragraph 40: As discussed in the commentary to Paragraph 36, the standard of proof of *reasonable suspicion* may be met where a police officer believes, on the basis of specific objective facts or inferences and in light of that police officer's experience, that a person has committed a criminal offense. The test is part objective and part subjective and is a lesser burden than that of probable cause, the balance of probabilities and beyond reasonable doubt.

Paragraph 42: The precise legal definition of the term *state* is a subject of debate among scholars of public international law and lies beyond the scope of this work. Paragraph 42 is not intended to provide a definitive statement of what a state is but instead to provide an inclusive definition of the term *state*. The purpose of doing so is to ensure that when the MCCP refers to a state, other entities are included. The reform of post-conflict laws may take place outside the context of a recognized state—as has been the case, for example, in Kosovo and in the early stages of the peace operation in East Timor (before East Timor was recognized as an independent state at an international level). In some articles of the Model Codes, it will be obvious to the reader that the term *state* could refer only to a state proper, such as with the signing of extradition treaties mentioned in Article 312 of the MCCP. The inclusive definition contained in the MCC is inspired by the commentaries to the Organization for Economic Cooperation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which discuss the scope of the term *foreign country* as defined in Article 1(4)(b) of the convention.

Paragraph 43: Reference should be made to the commentary to Paragraph 1.

Paragraph 44: The definition of *territory* is important in determining whether a state possesses territorial jurisdiction over a criminal offense under Article 4 of the MCC. It is also relevant to the determination of extraterritorial jurisdiction under Article 5 of the MCC. The question of territoriality of coastal seas and air space is one that is regulated by public international law and should be determined on a case by case basis. With regard to coastal seas, the generally recognized rule is that the waters 12 nautical miles from the coast of a state are considered part of its territory. A state may have certain rights regarding seas up to 200 nautical miles from its coast as part of an “exclusive economic zone” designated for the purpose of exploitation of resources; the state, however, does not have criminal jurisdiction over these waters.

Paragraph 45: The drafters of the Model Codes originally considered using the definition of *victim* contained in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Principle 1). The declaration defines victims as “persons who, individually or collectively, have suffered damage, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law operative within Member States.” While this definition is both comprehensive and accurate in terms of defining victimhood in a general sense, it was decided to narrow this definition slightly for the purposes of drafting a legal definition of victim for use in the Model Codes. The intent of the drafters was to create a definition that is practical and workable. The interests of victims are protected throughout the Model Codes (see, for example, Chapter 5 of the MCCP), and the drafters were concerned that such rights should be enforceable in a practical sense. If the definition of victim from the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was used in the MCC, a broad reading of it would require—for example, in Article 99 (“Notification of a Victim”)—that the police make efforts to inform every person in the state who has been personally or collectively affected by a criminal offense

of the progress of the criminal proceedings. In theory, this requirement may impose an obligation upon the police to inform large numbers of individual “victims,” an impracticable task that may have the adverse result of depriving victims who are more closely related to the criminal offense of their rights. The definition of victim contained in Paragraph 45 is based on a comparative survey of national legislation and the legal definition of the term *victim* contained in that legislation. The definition that was constructed gives both the person against whom the criminal offense was committed and close family members of that person enforceable rights under the MCCP. A partner (meaning a person in a nonmarital committed relationship with the person against whom the criminal offense was committed) has not been included in the definition of victim. A state may wish to consider adding partner to the list of victims. Reference should be made to Articles 72–79 and 99–100 of the MCCP and their accompanying commentaries, which address the rights of victims.

Paragraph 45 refers to an adopted parent and an adopted child. In some legal systems, it is not possible to “adopt” a child in the sense that the child will take the name of the adoptive parents. Different terminology is used to describe a relationship that is akin to adoption but in which the child maintains his or her family name. In a state that does not recognize adoption, the definition of victim used in domestic legislation should include any relationships that operate similarly to adoption.

Paragraph 46: Reference should be made to the commentary to Paragraph 2.

Article 2: Purpose of the MCCP

1. The MCCP determines the rules of criminal procedure that are applicable to criminal proceedings before the courts in [insert name of state] and to all actors and participants involved in the proceedings.
2. The MCCP sets out rules to guarantee that criminal offenses are investigated and prosecuted effectively and efficiently while at the same time guaranteeing that suspects, accused persons, victims, and all other persons coming into contact with the criminal justice system are treated equitably, fairly, and in a manner that complies with international human rights standards.
3. Any restrictions on the rights of persons in the investigation of a criminal offense may only be imposed in compliance with the MCCP and the applicable law.

Commentary

Article 2 provides a broad statement on the purpose, or goals, of the criminal procedure laws laid out in the MCCP. Two goals were of particular importance to the draft-

ers of the MCCP. First, it was important that the MCCP be tailored to fit the exigencies of a post-conflict environment. Second, it was essential to create legal provisions that would enable a criminal investigation and prosecution to be undertaken efficiently and effectively while ensuring that the rights of persons coming into contact with the criminal justice system (primarily suspects, accused persons, and victims) would be treated in a manner that complies with international human rights standards. The balancing of rights against the need to effectively and efficiently investigate and prosecute crime was a constant theme in drafting the MCCP, as it is in the drafting of post-conflict criminal procedure laws. Article 2, in setting out the purpose of the MCCP, articulates the importance of this balance. Article 2 also lays out the principle that all suspects, accused persons, victims, and all other persons who come into contact with the justice system are treated equitably and fairly.

In the aftermath of conflict, many states decide to reform their preexisting criminal laws. Some post-conflict states completely overhaul their entire criminal procedure framework. As a reaction to past human rights abuses, significant emphasis is often placed on ensuring that new laws comply with international human rights norms and standards. The United Nations report *The Rule of Law and Transitional Justice in Conflict and Post-Conflict States* (UN document S/2004/106) states that international human rights law should form the normative framework of all rule of law interventions (paragraph 9). While fully agreeing with this position, the drafters of the MCCP and many experts consulted during its creation also deemed it imperative to balance the need to incorporate international human rights norms and standards into criminal procedure laws against the need to ensure public safety and security through effective and efficient criminal investigations and prosecutions. Some post-conflict states, facing epidemics of crime, have introduced legislation that is more focused on crime control than on ensuring that human rights are adequately and comprehensively addressed. Conversely, other post-conflict states have made the mistake of tipping the scales too far in favor of a purely rights-based approach to justice. Paradoxically, this latter approach has inadvertently led to violations of human rights. Where the criminal procedure law does not provide sufficient powers to investigate crimes, the criminal process is stymied and thus the citizen's right to adequate redress for criminal wrongs committed against him or her or his or her property (inherent in a state's duty to respect and protect the rights of citizens, such as their right to life or property, under international human rights law) is not protected. In the case of El Salvador, for example, reform of domestic criminal procedure law was widely criticized for overemphasizing international human rights law and underemphasizing the need to fight crime and effectively investigate criminal offenses, to the detriment of the safety and the rights of its citizens (see Margarita S. Studemeister, *El Salvador: Implementation of the Peace Accords*, Peaceworks no. 38, United States Institute of Peace, p. 17). The example of El Salvador underscores the importance of the broad purposes of the MCCP set out in Article 2, which require that the MCCP simultaneously protect rights, ensure public safety and security, and ensure efficient and effective criminal investigations and prosecutions.

Chapter 2: Courts, Court Administration, and Provisions Relating to Court Proceedings

General Commentary

In most legal systems, the organization of courts is laid out not in a code of criminal procedure but in the country's constitution, in a law on courts, or in both. In a post-conflict setting, a peace agreement may also provide details of the composition and structure of the court system or at least of a temporary, transitional system. In some instances, the country's code of criminal procedure may contain a number of provisions regarding the court system but the code certainly does not contain the majority of such provisions.

The MCCP, along with the other Model Codes (the Model Criminal Code, the Model Detention Act, and the Model Police Powers Act), does not focus on institutional reforms of criminal justice institutions (such as police, courts, prosecutor, and defense counsel) in post-conflict states. Instead, the Model Codes address substantive and procedural laws. The purpose of Chapter 2, therefore, is not to provide a sample law on courts. Instead, this chapter sets out a skeletal and hypothetical court system to demonstrate how the provisions of all the Model Codes might work within a real court system. The inclusion of a hypothetical court system also serves to demonstrate the importance of incorporating certain elements in domestic legislation on courts, particularly elements concerning human rights. For example, Articles 15–20 of the MCCP enshrine the right to trial by an independent tribunal and by independent and impartial judges.

The court system laid out in Chapter 2 consists of trial courts that serve as the courts of first instance and an appeals court to which matters from the various trial courts are appealed. It designates a president and vice president of the court system, in addition to judge administrators who supervise each individual trial court, and a president of the appeals court. It also establishes an individual registry for each court, and provides for additional court staff. Reference should be made to the annex figure 1, for a diagram of the MCCP court system.

Part 1: Organization of Courts

Article 3: Courts in [insert name of state]

The courts in [insert name of state] consist of:

- (a) trial courts;
- (b) an appeals court; and
- (c) [specialized courts].

Commentary

Reference should be made to Articles 4–9 on trial courts and Articles 10–14 on appeals courts. Article 3 sets up a court system with numerous trial courts but only one appeals court. Article 3 also refers to “specialized courts” but does not elaborate upon them. The reference to specialized courts is intended to highlight their potential existence, especially in a post-conflict context. Where such a court is established in a post-conflict state, it is regulated by a law outside the criminal code and criminal procedure code. Specialized courts deal with discrete crimes or groups of crimes. They may be regulated by distinct procedural provisions outside of the criminal procedure code, and, typically, they consolidate specialized knowledge or skills needed to adjudicate what are often complex crimes. For example, the United Nations Transitional Administration in East Timor created the Special Panels for Serious Crimes with jurisdiction over genocide, war crimes, crimes against humanity, torture, murder, and sexual offenses (see UNTAET Regulation 2000/15 on the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offenses). A similar mandate was given to the Special Court for Sierra Leone set up in 2000 by agreement between the United Nations and the government of Sierra Leone. In Iraq, the Central Criminal Court was established in 2003 with jurisdiction over serious crime cases, including terrorism, money laundering, and drug trafficking. There are other so-called special mechanisms to prosecute and try serious criminals, such as the use of international judges or prosecutors. For a more complete discussion on these mechanisms and on special courts, see Colette Rausch, *Combating Serious Crimes in Postconflict Societies: A Manual for Policymakers and Practitioners*, pp. 80–97.

Part 2: Trial Courts

Article 4: Territorial Jurisdiction of Trial Courts

1. Trial courts are established at:
 - (a) [insert location] with jurisdiction over [insert area over which the court has jurisdiction];
 - (b) [insert location] with jurisdiction over [insert area over which the court has jurisdiction]; and
 - (c) [insert location] with jurisdiction over [insert area over which the court has jurisdiction].
2. Where a criminal offense is committed on a vessel or aircraft that is registered in [insert name of state], the trial court of [insert location] has jurisdiction over the criminal offense. If the vessel or aircraft is not registered in [insert name of state], jurisdiction lies with the court with jurisdiction over the first port of arrival in the state.
3. Where a trial court lacks territorial jurisdiction over a case, it must promptly refer the case to the competent trial court.
4. The president of the courts must settle any dispute between two or more trial courts regarding jurisdiction over a case. Where the president determines that a particular trial court does not have jurisdiction over the case, the president must order the transfer of the case to the appropriate trial court.

Commentary

Article 4 of the MCC deals with territorial jurisdiction of the whole court system in a particular state and sets out general principles. In contrast, Article 4 of the MCCP addresses the territorial jurisdiction of individual trial courts within the broader territory of the state. Each trial court should have a specific geographical area over which it has jurisdiction. It may try cases only within its area of jurisdiction. A court that does not have jurisdiction must not try the case and must defer jurisdiction to the competent court. Any disputes should be settled by the president of the courts, who has the power to order which court should hear the case.

Article 5: Subject Matter Jurisdiction of Trial Courts

Trial courts have jurisdiction in all matters as courts of first instance.

Commentary

A “court of first instance” is the court where a criminal case commences. All criminal cases under the MCCP should be heard at first instance in the trial courts. In some states, different cases are heard in different courts of first instance. For example, less serious criminal offenses may be heard in a town court, district court, or county court, while more serious criminal offenses may be tried only before the high court. Appeals may go to a supreme court or a constitutional court. Because the MCCP does not deal with minor offenses and because it is creating only a skeletal court system, the drafters chose to provide the simplest court structure possible, namely, trial courts as the courts of first instance and appeals courts as the courts of second and final instance.

Article 6: Composition of Trial Courts

1. Each trial court is composed of judges who are appointed by the [insert appointing authority].
2. Except as otherwise provided in Paragraphs 3 and 4, the trial of an accused must be conducted by a single judge.
3. Where an offense is punishable by a penalty of imprisonment exceeding five years, the trial of the accused must be conducted by a panel of three judges.
4. An extradition hearing under Article 315 must be conducted by a panel of judges.
5. Where a case is being determined by a panel of judges, the panel must determine the criminal responsibility of the accused by a majority vote, with the vote of each judge having equal weight.

Commentary

Paragraph 1: The way in which judges are appointed—which varies greatly from one state to another—is not elaborated upon in this paragraph. This issue should be addressed in legislation outside of a criminal procedure code, either in the state’s constitution, a law on courts, or a separate piece of legislation. The appointment of judges in many post-conflict states has involved the establishment of judicial councils or judicial commissions as part of overall institutional reforms efforts.

Paragraphs 2 and 3: A single judge should sit on a case where the penalty range for the criminal offense concerned is one to five years’ imprisonment (reference should be made to Article 38 of the MCC for a discussion of penalty ranges). For all other criminal offenses, the case should be heard by a panel of three judges.

The jury system that is used in some legal systems has not been adopted in the MCCP. One reason for this is that the drafters concluded that in the aftermath of an ethnic or religious conflict that may have occurred in some post-conflict settings, it might be difficult to convene a jury free of bias against an accused who is not from their ethnic or religious group. Another reason is that operating a viable jury system is expensive and requires that jury members be compensated for their expenses for travel, sustenance, and so forth. In a resource-poor post-conflict state, the authorities may simply not have the means to sustain the jury system. In post-conflict Liberia, for example, victims of crime were reportedly forced to pay judges and juries to hear cases against the alleged perpetrators. Yet another reason why the MCCP’s drafters opted not to embrace the jury system is because of the potential for corruption or intimidation of juries in states without adequate safeguards to prevent this. In some instances, accused persons have paid the jury to secure a not-guilty conviction. Having a case heard by a professional judge will not eliminate the threat of corruption, but it will reduce the number of people who are potential targets for bribes.

Paragraph 4: Given the complexity of requests for extradition, all such requests, irrespective of the potential penalty that may be imposed for the criminal offense in question, must be heard by a panel of three judges. Reference should be made to Chapter 14, Part 2, on “Extradition” and its accompanying commentaries.

Paragraph 5: At the end of the trial, the panel of judges will deliberate and then vote on each count in the indictment, as provided for in Article 263. The decision on whether an accused person is criminally responsible will be determined by the majority vote of the panel; two votes in favor will secure a conviction or acquittal on each count of the indictment. Reference should be made to Article 263 and its accompanying commentary.

Article 7: Judge Administrator of Each Trial Court

1. The [insert appointing authority] must designate a judge in each trial court to serve as the judge administrator.
2. The judge administrator is responsible to the president of the courts in [insert name of state] and is under his or her direction and control.
3. The judge administrator is responsible for all administrative matters in the trial court and must submit periodic reports to the president of the courts.
4. The judge administrator is also responsible for such other duties as provided for in the MCCP.

Commentary

For each trial court under the MCCP, a judge administrator must be appointed. A judge administrator is responsible for overseeing the administrative functioning of the particular trial court and plays a key role in overseeing the operations of the court, promoting its efficiency, and ensuring accountability to the public. He or she is required to make executive decisions on procedural or administrative matters concerning the trial court and to evaluate and analyze information leading to improved court administration. The judge administrator is also responsible for hearing complaints regarding court procedures or administrative procedures from prosecutors, defense counsel, or a member of the general public. The judge administrator will be responsible for developing an administrative plan for the proper, efficient, and prompt disposition of cases. His or her duties will also include the drawing up of a judges' roster that determines the duties of each judge on any given day, including those judges who are assigned to particular courts on a particular day and those assigned to "paper duties" (i.e., responding to applications and motions to the court); the roster also includes the weekend duty roster, which shows which judge is responsible for dealing with urgent matters on weekends and public holidays. Moreover, the judge administrator may be responsible for outlining the amount of cases each court can be expected to deal with effectively each month or year. This may involve the compilation of statistics, which would be included in the periodic report that the judge administrator is required to submit to the president under Paragraph 3, along with statistics on the number of motions and applications submitted to the court and the number of court staff. A proposed budget would also need to be compiled and included in the periodic report.

Paragraph 4: The “other duties as provided for in the M CCP” are laid out in Article 25 (on the duty of the judge administrator to oversee the work of court staff), Article 154 (on the assignment of a replacement judge to determine whether protected materials can be released in the absence of the judge who originally made the order for protective measures), Article 189 (on the extension of the maximum period of preindictment detention or house arrest), and Article 272 (on the assignment of a replacement judge to supervise imprisonment where the originally assigned judge is no longer available). Reference should be made to these articles and their accompanying commentaries.

Article 8: Presiding Judge of Each Panel in a Trial Court

1. Each panel of judges in a trial court has a presiding judge, designated by the judge administrator.
2. The presiding judge must lead the proceedings of the panel.
3. The presiding judge must not give directions to the other judges of the panel on substantive matters of law, their assessment of the evidence, or their findings in a case.
4. The presiding judge must nominate one judge of the panel as the judge rapporteur. The judge rapporteur has the primary responsibility for preparation of the final written judgment in the case.
5. The presiding judge must ensure order in the courtroom.

Commentary

Article 6(3) requires that a criminal offense punishable by a penalty of imprisonment exceeding five years must be conducted by a panel of three judges. In such cases, all matters relating to the criminal investigation (including motions and applications to permit certain investigatory actions, such as search and seizure) and the indictment hearing will be conducted by a single judge. At the trial stage, a panel must be assigned, and, in accordance with Article 8, each panel must have a presiding judge. The presiding judge will be designated by the judge administrator when he or she is assigned the case. The presiding judge will, in turn, nominate a judge rapporteur to prepare the judge in the case. The presiding judge will be responsible for leading the supervision of the trial proceedings, including ensuring order in the courtroom; however, the presiding judge may not direct or order the other two judges on the panel with regard to the law, the evidence, or the findings in the case.

Paragraph 5: Reference should be made to Article 41, which provides the court with the power to sanction persons for misconduct before the court.

Article 9: Cooperation between Trial Courts

1. Each trial court in [insert name of state] must cooperate with a request of another trial court in the state, including for the following measures:
 - (a) service of orders, warrants, decisions, motions, or summonses of the requesting court on persons in the jurisdiction of the requested trial court;
 - (b) reenactment of a criminal offense in the jurisdiction of the requested trial court;
 - (c) access to the case files of the requested trial court; and
 - (d) execution of a decision of the requesting court if the subject of the decision is located in the jurisdiction of the requested trial court.
2. A request for cooperation may only be denied where:
 - (a) the requested trial court does not have jurisdiction to comply with the request; or
 - (b) release of the information requested under Paragraph 1(c) is otherwise precluded by the MCCP.

Commentary

International cooperation (i.e., cooperation between domestic courts and the courts in another state) is addressed in Chapter 14, Part 1, of the MCCP. Article 9, in contrast, deals with cooperation between different courts within the same state. Paragraph 1 provides a nonexhaustive list of different measures a trial court can request another trial court in the domestic jurisdiction to undertake. For example, if a trial court in one location issues an order for protective measures in a case where a suspect or an accused (who must be served with the order under Article 153 of the MCCP) lives within the jurisdiction of another trial court, the requesting trial court can request that the other trial court serve the order on the suspect or the accused. In addition to service of documents, a trial court may request another court to execute a decision, to reenact a criminal offense (reference should be made to Article 240 that gives the court the power to order the reenactment of a criminal offense) or to access documentation

in the court's possession. The requested trial court may refuse a request for cooperation only where the requested court does not have jurisdiction to undertake the request or where it is legally precluded from doing so—for example, where a trial court requests the release of protected materials relating to an order for protective measures without the legal release order required under Article 155.

Part 3: The Appeals Court

Article 10: Territorial Jurisdiction of the Appeals Court

An appeals court is established at [insert location] with jurisdiction over [insert name of state].

Commentary

Under the M CCP, there is one appeals court, which has jurisdiction over the entire state. Typically, an appeals court is located in the capital city of the state.

Article 11: Subject Matter Jurisdiction of the Appeals Court

The appeals court has jurisdiction to hear appeals from trial courts and extraordinary legal remedies as provided for in Chapter 12 of the M CCP.

Commentary

Chapter 12 of the M CCP sets out the various types of appeals and extraordinary legal remedies that are permissible under the M CCP, including appeals against acquittal or conviction or against a particular penalty (Part 1), which come into play after the final judgment of the trial court; applications to reopen criminal proceedings (Part 2); and interlocutory appeals, which can be made prior to the final judgment (Part 3). Reference should be made to the general commentaries to Chapter 12, Parts 1–3 , for a discussion of the meaning and scope of appeals and extraordinary legal remedies within the context of the M CCP.

Article 12: Composition of the Appeals Court

1. The appeals court is composed of judges who are appointed to the relevant panel by the [insert appointing authority].
2. The judges of the appeals court must sit in panels of three judges designated by the president of the appeals court.
3. The panel must take all decisions by a majority vote, with the vote of each judge having equal weight.

Commentary

Paragraph 1: The way in which appeals court judges are appointed—which varies greatly from one country to another—is not elaborated upon in this paragraph. This issue should be addressed in legislation outside a criminal procedure code, either in a country’s constitution, a law on courts, or a separate piece of legislation.

Paragraph 2: All cases on appeal must be heard by a panel of judges rather than by a single judge. This stipulation applies irrespective of the penalty range for the particular offense.

Article 13: President of the Appeals Court

1. The [insert appointing authority] must designate a judge as the president of the appeals court.
2. The duties of the president of the appeals court are set out in Article 21, Article 22, and Article 25.

Commentary

Paragraph 1: The way in which the president is appointed—which varies greatly from one country to another—is not elaborated upon in this paragraph. This issue should be addressed in legislation outside a criminal procedure code, either in a country’s constitution, a law on courts, or a separate piece of legislation.

Article 14: Presiding Judge of Each Panel in the Appeals Court

1. Each panel of judges in the appeals court has a presiding judge, designated by the president of the appeals court, who is the judge to whom the case is initially assigned.
2. Each presiding judge must lead the proceedings of the panel.
3. The presiding judge must not give directions to the other judges of the panel on substantive matters of law, their assessment of the evidence, or their findings in a case.
4. The presiding judge must nominate one judge of the panel as the judge rapporteur. The judge rapporteur has the primary responsibility for preparation of the final written judgment.
5. The presiding judge must ensure order in the courtroom.

Commentary

Reference should be made to the commentary accompanying Article 8.

Part 4: Judicial Independence and Impartiality

General Commentary

This part addresses the topic of judicial independence and impartiality. The right to a trial by an independent and impartial tribunal is a core element of international human rights norms and standards, first articulated in 1948. According to the Bangalore Principles of Judicial Conduct, the right to judicial independence is essential in upholding the rule of law in a state (Preamble), while the Suva Statement on the Principles of Judicial Independence and Access to Justice declares that it is essential for the protection of all human rights (Preamble). The right to an independent and impartial tribunal is set out in a variety of other treaties including the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 14[1]), the African Charter on Human and Peoples' Rights (Article 7[1]), the American Declaration of the Rights and Duties of Man (Article XXVI[2]), the American Convention on Human Rights (Article 8[1]), the European Convention on Human Rights and Fundamental Freedoms (Article 6[1]), and the United Nations Convention on the Rights of the Child (Article 37[d]). In addition, the right to judicial independence and impartiality is generally enshrined in the constitutions of most states. This right has also been elaborated upon in a number of nonbinding resolutions and declarations from both within the United Nations system and outside. Reference may be made to the United Nations Basic Principles on the Independence of the Judiciary (and the related Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary), the United Nations Draft Declaration on the Right to a Fair Trial and a Remedy (paragraphs 13–24), the Suva Statement on the Principles of Judicial Independence and Access to Justice (2004), the Bangalore Principles of Judicial Conduct (2002), the International Bar Association Minimum Standards of Judicial Independence (1982), the Latimer House Guidelines for the Commonwealth (1998), the Council of Europe Recommendation No. R(94)12 (1994), and the African Commission Resolution on the Respect and Strengthening on the Independence of the Judiciary (1996).

Further elaboration on the meaning of judicial independence and impartiality may be distilled from the case law of the various international and regional human rights bodies and courts. For a comprehensive discussion of this case law and the international and regional binding and nonbinding documents on judicial independence and impartiality, reference can be made to Jonas Grimheden, *Assessing Judicial Independence in the Peoples' Republic of China under International Human Rights Law*. Other useful tools are listed in the section “Further Reading and Resources” near the end of this volume.

Initially, the provisions of Part 4 contained merely the broad principle that judges should be independent and impartial. During the course of the MCCP vetting process, various experts suggested that this provision be expanded to elucidate the various fac-

ets of judicial independence and impartiality. The MCCP drafters therefore augmented the broad principles of independence and impartiality. There are, of course, limits to this, because many provisions relating to judicial independence and impartiality are ordinarily found outside of a criminal procedure code. For example, the principles of judicial independence and impartiality and other related principles may be set out in a country's constitution, its laws on courts, court rules and procedures, codes of conduct, or codes of ethics. Part 4 thus contains an elaboration on the core aspects of judicial independence and impartiality without addressing the details that are usually outside the scope of a criminal procedure code.

Judicial independence and impartiality include a number of different aspects that may be clustered as follows (this taxonomy is taken from Grimheden, *Assessing Judicial Independence in the Peoples' Republic of China under International Human Rights Law*, p. 51):

- Independence
 - Collective independence
 - Structural
 - Resources
 - Individual independence
 - Occupational
 - Internal Structure
 - Rights of Judges
- Impartiality
 - Recusal
 - Nonconflicting Assignment
- Public confidence
 - Transparency
 - Representativity

Judicial independence, impartiality, and public confidence are all addressed in Part 4. Article 15 addresses judicial independence, along with Article 16 that deals with the related issue of insulation from pressure. Article 17 relates to judicial impartiality. Article 17 is complemented by Articles 18 and 19, which provide both a voluntary and an involuntary mechanism for a judge to be removed from a particular case for lack of impartiality. Finally, Article 20 deals with the issue of public confidence that relates to the twin principles of judicial independence and impartiality. It is worth noting that these twin principles are related and therefore overlap conceptually to some degree. Generally speaking, independence relates to insulation from pressure (hence the inclusion of Article 16) at an institutional level, while impartiality relates to the neutrality and lack of bias of individual judges. However, independence, as is outlined in the taxonomy above, may also apply to the individual. For the purposes of the MCCP, a distinction has been made between independence and impartiality, although readers should be aware of the linkages.

Article 15: Judicial Independence

1. The judiciary, meaning the courts and the judges, must be independent.
2. Independence entails:
 - (a) institutional guarantees of insulation from pressure;
 - (b) guarantees of actual as well as the appearance of unbiased adjudication; and
 - (c) procedures that instill public confidence.

Commentary

As discussed above in the general commentary to Part 4 (and as set out in the taxonomy above), the concept of judicial independence has collective, or institutional, aspects as well as individual ones. These aspects are sometimes termed *institutional independence* and *functional independence*. The International Bar Association Minimum Standards of Judicial Independence terms them *personal independence* and *substantive independence*, respectively. According to paragraph 1(b) of the standards, “personal independence means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.” Substantive independence, on the other hand, means that “in the discharge of his/her judicial function a judge is subject to nothing but the law and the commands of his/her conscience.” Article 15(2) of the MCCP addresses both personal and substantive independence.

Paragraph 2(a) requires that judges and the courts as an institution (i.e., the judiciary) be insulated from outside pressure. This requirement is addressed more fully in Article 16 and its accompanying commentary.

Paragraph 2(b) requires that guarantees be set in place to ensure unbiased adjudication as well as the appearance of unbiased adjudication. This paragraph underscores a very important sentiment: judicial independence must be assessed from both an objective and a subjective perspective. Objectively, an assessment of judicial independence entails looking at factors such as the appointment of judges, duration of their terms of office, and guarantees against external pressure laid out in Paragraph 2(a) and Article 16 (see *Campbell and Fell v. United Kingdom*, Judgment, European Court of Human Rights [ECHR], Application nos. 7819/77 and 7878/77, June 28, 1984). Equally important is the appearance of independence. An old maxim states that “justice must not only be done but must also be seen to be done.” The sorts of guarantees envisaged in Paragraph 2 have been articulated by the United Nations Human Rights Committee in its “General Comment no. 13” (paragraph 3), which states that the issue of independence and impartiality raises matters “with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the condition governing promotion, transfer and cessation of their

functions and the actual independence of the judiciary from the executive branch and the legislative.” A number of overlapping and additional guarantees have been elaborated upon in different instruments on judicial independence. The United Nations Basic Principles on the Independence of the Judiciary lists these guarantees under a number of different headings, including “Freedom of Expression and Association”; “Qualifications, Selection, and Training”; “Conditions of Service and Tenure”; “Professional Secrecy and Immunity”; and “Discipline, Suspension, and Removal.” Two key principles from this instrument, both found in Principle 11, are that the terms of judges’ service and conditions of service must be secured by law and that judges should receive adequate remuneration. The requirement of adequate remuneration is also found in the International Bar Association Minimum Standards of Judicial Independence (paragraphs 14 and 15). The International Bar Association Standards, the United Nations Basic Principles (Principle 7), and Procedure 5 of the United Nations Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary all state that court services as a whole should be adequately financed in order to ensure institutional independence. The United Nations Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary also require that “States shall pay particular attention to the need for adequate resources for the functioning of the judicial system, including appointing a sufficient number of judges in relation to caseloads, providing the courts with necessary support staff and equipment, and offering judges appropriate personal security, and remuneration and emoluments” (Procedure 5). Some experts argue that and without these resources, judiciary independence could be jeopardized because judges might seek to augment their income by accepting money or gifts from interested parties, as has occurred in a number of post-conflict states and territories such as Cambodia, Kosovo, Liberia, the Democratic Republic of the Congo, and Sierra Leone. In addition to receiving security, remuneration, and resources, judges must have immunity from suit to safeguard their independence as laid down by Principle 16 of the United Nations Basic Principles and paragraph 43 of the International Bar Association Minimum Standards of Judicial Independence.

The final aspect of judicial independence—public confidence—is articulated in Paragraph 2(c) of Article 15 and specifically addressed in Article 20.

Article 16: Insulation from Pressure

1. Judges must perform their duties independently, and in accordance with the applicable law and their solemn declaration.
2. No state entity, private or public organization, national or international organization, or person may influence, seek to influence, or appear to influence the judiciary.

3. The judiciary, meaning judges and courts, must also be independent from pressure from within the court and from other courts or judges.

Commentary

The insulation of the court system as a whole and the individual judges within it is a crucial element of judicial independence set out in Article 15(2)(a). The necessity to insulate the courts and judges is recognized in Principles 2 and 4 of the United Nations Basic Principles, Values 1.3 and 1.4 of the Bangalore Principles of Judicial Conduct, and paragraphs 16 and 46 of the International Bar Association Minimum Standards of Judicial Independence. The prime referents that judges must have in carrying out their duties are the applicable law and the solemn declaration that they make upon being appointed a judge.

Judges must be insulated from two types of pressure: external and internal. External pressure means pressure from external actors, for example, the executive, the legislature, an international organization, or a private person. The International Bar Association Principles state that the executive and ministers of the government must not control judicial functions (paragraphs 2, 3, 5, and 16). Nor must pressure be brought by international actors. For example, judges in Kosovo complained of undue political pressure by international actors requesting that certain suspects not be released from detention, although evidence was not sufficient to hold them. This type of undue pressure violates the independence of the judiciary. According to the Bangalore Principles, “a judge shall not only be free from inappropriate connections with, and influence by, the executive and legislative branches of government, but must also appear to the reasonable observer to be free therefrom” (Value 1.3). The second type of pressure that must not be exerted over a judge is internal pressure. Pressure must not be brought to bear on judges from colleagues and those inside the judicial system. Paragraph 46 of the International Bar Association Principles states that, “in the decision-making process, a judge must be independent vis-à-vis his judicial colleagues and supporters.”

Where there is any doubt as to impartiality, either objective or subjective, a judge must excuse himself or herself from the case in accordance with Article 18. Where the judge is not forthcoming in exercising this duty, he or she must be disqualified from the case under Article 19, if grounds for disqualification apply.

Article 17: Impartiality of Judges

1. Judges must decide matters before them without prejudice and without improper influence of a direct or indirect nature from any source or for any reason.

2. Judges must uphold the appearance of impartiality by excusing themselves when reasonable to do so under Article 18. A judge who does not excuse himself or herself may be disqualified under Article 19 on the basis of lack of impartiality.
3. Judges must not engage in activities or maintain interests in activities or entities that affect their impartiality or appearance of impartiality.

Commentary

The concept of impartiality requires that a judge act without favor, bias, or prejudice in the adjudication of a case. A judge who holds an actual bias or prejudice against a person who is party to the proceedings (e.g., the accused) or who has personal knowledge of the disputed facts of the case cannot be considered to be impartial. Moreover, a judge must not have a vested interest in a case. A vested interest occurs where a judge has an economic or other interest in the outcome of the case or where he or she has a spousal, parental, or other close family, personal, or professional relationship or a subordinate relationship with any of the parties. As alluded to in Paragraph 2, the judiciary must act to ensure that there exists neither actual nor perceived partiality, otherwise known respectively as “subjective impartiality” and “objective impartiality.” A judge’s objective impartiality may be called into question where he or she engages in certain activities outside the scope of his or her work or where, for example, he or she has expressed opinions through the media, in writing, or in public actions that could adversely affect his or her required impartiality. In some instances, judges are barred from certain extra-career activities in order to secure the perception of objective independence. This usually does not include teaching but may include involvement in certain business activities (as discussed in paragraph 39 of the International Bar Association Minimum Standards of Judicial Independence).

Article 18: Excusal of a Judge on Account of Lack of Impartiality

1. A judge must not participate in a case if he or she:
 - (a) is a victim of the criminal offense;
 - (b) is a relative of the defense counsel, the victim, the counsel for the victim, or the accused;
 - (c) has taken part in the proceedings as a prosecutor, a defense counsel, or a counsel for the victim, or has been examined as an expert witness or witness; or

- (d) in the same case, has taken part in rendering a decision of a lower court, or, if in the same court, has taken part in rendering a decision that is being challenged by appeal.
- 2. A judge must not participate in the confirmation of an indictment where he or she has ordered the detention of the suspect.
- 3. A judge must not participate in the trial of an accused if he or she:
 - (a) has participated in pretrial proceedings, including proceedings to confirm an indictment in the same case; or
 - (b) has participated in pretrial proceedings, including proceedings to confirm an indictment in a different case against the same accused person.
- 4. A judge must not participate in a case where, apart from the instances set out in Paragraphs 1–3, his or her impartiality might reasonably be doubted on any ground.
- 5. Where the impartiality of a judge is compromised or is in doubt, the judge must make a request to the president of the courts of [insert name of state] to be excused from participating in a particular case.
- 6. A judge seeking to be excused from his or her functions must make a written request to the president of the courts of [insert name of state], setting out the grounds for the request.
- 7. The president of the courts must treat the request as confidential.
- 8. The president of the courts must deliver a decision on whether the requesting judge will be excused from the particular case in question.
- 9. Where a request for excusal is granted, the president of the courts must assign a new judge to the proceedings and ensure that the judge who is the subject of the request takes no further part in the proceedings.
- 10. All the actions of the judge who has been excused are deemed valid until the time at which he or she is excused by the president of the courts.

Commentary

Article 18 provides a mechanism for a judge who believes that his or her or the court's impartiality—real or perceived—may be in doubt to excuse himself or herself from a case. The Bangalore Principles of Judicial Conduct categorically state that “a judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially” (Value 2.5). Paragraphs 1–3 lay out specific instances, based on the general principle set out in Article 17, in which a judge must excuse himself or herself on account of lack of impar-

tiality, either real or perceived. Paragraph 4 provides a general residual provision that requires a judge to excuse himself or herself when, under other circumstances, the impartiality of a judge may be in doubt.

Where there is any doubt as to the impartiality of a judge, the judge must make a request for excusal to the president of the courts, who must consider the grounds of the request and deliver a decision on the matter. If the judge is excused, a new one must be assigned to the case.

Paragraphs 2 and 3: International human rights jurisprudence discusses the issue of whether prior participation in a criminal case renders a judge partial and therefore subject to excusal or disqualification. For example, this issue was discussed by the European Court of Human Rights in *Hauschildt v. Denmark* ([1990] 12 ECHR 266). Involvement in pretrial proceedings by a judge will not necessarily preclude his or her participation in the main trial. According to the European Court, the focus for adjudicating the issue of impartiality should be the “scope and nature” of prior involvement (*Nortier v. The Netherlands* [1994] 17 EHHR 273, paragraph 33).

Under the MCCP, rather than provide for a general provision on a lack of impartiality based on prior participation, the drafters instead decided to enunciate specific instances in Paragraphs 2 and 3 of prior participation that would render a judge partial and therefore subject to excusal or disqualification.

In post-conflict states in which there is a shortage of judges, Paragraphs 2 and 3, while preferable, may not be entirely feasible. In some instances, the potential pool of judges may be exhausted where there is an obligation that the trial judge, for example, must have had no prior involvement in the case. In such states, the drafters of new laws may wish to consider modifying the provisions of Paragraphs 2 and 3, at least in the short term.

Article 19: Disqualification of a Judge on Account of Lack of Impartiality

1. A suspect, an accused, defense counsel for the suspect or accused, a judge, or a prosecutor may at any time object to the participation of a particular judge in a case where the judge’s impartiality is in doubt.
2. A request for disqualification of a judge does not suspend the proceedings unless the judge in question decides so.
3. A request for disqualification must be made in writing to the president of the courts of [insert name of state] and must be made as soon as the grounds for impartiality are discovered.

4. A written sworn statement must be prepared that states the grounds upon which the request lies. Any relevant evidence must be attached to the sworn statement.
5. The sworn statement must be filed at the registry of the appeals court. The registry must transmit the request to the president of the courts immediately.
6. The registry must also transmit the request for disqualification to the judge who is the subject of the request, along with a description of the evidence that has been submitted by the party who filed the written statement.
7. The judge who is the subject of the request for disqualification is entitled to present written submissions to the president of the courts.
8. The president of the courts must determine whether to grant the request on the basis of the written sworn statement and the evidence accompanying it and the written submissions of the judge in question, if any were presented.
9. Where a request for disqualification is granted, the president of the courts must assign a new judge to the proceedings and ensure that the judge who is the subject of the request takes no further part in the proceedings.
10. All the actions of the judge who has been disqualified will be deemed valid until the time at which he or she is disqualified by the president of the courts.

Commentary

Where a judge does not voluntarily excuse himself or herself from a case in which there is actual or perceived partiality on his or her part, Article 19 provides a mechanism for a suspect or accused person or his or her defense counsel, any judge, or the prosecutor to file a request for the disqualification of the judge. The request is filed with the registry of the appeals court, which then transmits it to the president of the courts, who is responsible for determining the validity of the claim. This disqualification modality should not be confused with removal from office, where a judge is removed permanently on the grounds of “serious misconduct” or “stated misbehavior,” for example, both of which are common grounds for permanent dismissal of a judge. Under Article 19, the judge is disqualified from acting in the course of his or her duties only with regard to the particular case in question. However, the issues of lack of impartiality raised during the course of the proceedings may be grounds for further disciplinary action against the judge or even permanent removal. Permanent dismissal of a judge is normally dealt with in a code of ethics or a separate piece of legislation outside of the criminal procedure code and is thus not addressed in the M CCP.

Article 20: Public Confidence

The judiciary must ensure that there are procedures in place to enhance public confidence, including:

- (a) transparency of the judiciary's activities; and
- (b) representativity.

Commentary

According to the Bangalore Principles of Judicial Conduct, “public confidence in the judicial system and in the moral authority and integrity of the judiciary is of the utmost importance in a modern democratic society” (Preamble). Public confidence is an element of both judicial independence and judicial impartiality. As discussed in the commentaries to Articles 15 and 16, there is an element of objective, or public, perception to both independence and impartiality. A perception of the absence of independence and impartiality is as relevant as their actual absence. References to public confidence are scattered through the various nonbinding sources on judicial independence and impartiality, although it is not specifically mentioned in any of the treaties that refer to judicial independence and impartiality. Based on the case law from various international and regional human rights bodies, and on nonbinding instruments on judicial independence and impartiality, many scholars maintain that the concept of public confidence is best protected by ensuring transparency of the judiciary's actions and representativity in the composition of the judiciary. Procedural transparency may include measures to make rules, procedures, and practices of courts public and available for public reference. It may also include measures to ensure transparency of judgments and decisions of courts (excluding, of course, the internal deliberations of judicial panels and those decisions that are confidential for the purpose of protecting a victim or witness). The creation of designated points of contact with other agencies in the criminal justice system and beyond is an important transparency mechanism. Finally, the publication of court activities, including workload, budget, and staffing allocations, may also be an important element of transparency. Representativity relates to the composition of the judiciary. The judiciary should as a whole reflect different branches of society and include male and female judges from different ethnic and linguistic groups and different geographical locations. This is an issue relating to judicial appointment and should rightly be addressed in a law on courts, for example.

Part 5: Organs of the Courts and Their Competencies

Section 1: President and Vice President of the Courts

Article 21: President and Vice President

1. The [insert appointing authority] must designate a president of the courts in [insert name of state].
2. The [insert appointing authority] must designate a judge as vice president of the courts in [insert name of state] to serve in the place of the president when the president is unable to carry out his or her functions.

Commentary

The manner in which the president and the vice president of the courts are appointed is not elaborated upon in this paragraph because appointment procedures vary world-wide. This issue should be addressed in legislation outside a criminal procedure code, either in the constitution, a law on courts, or a separate piece of legislation.

Article 22: Responsibilities of the President of the Courts

1. The president of the courts in [insert name of state] is responsible for:
 - (a) the overall administration of the courts in [insert name of state]. In particular, he or she must supervise the work of the trial courts and the appeals court and submit an annual court activity report to the competent legislative authority;

- (b) the preparation of a precise plan outlining the general system of distribution of cases to the judges of the trial courts and the appeals court. The plan must be published and may be reviewed by the president on a regular basis, if necessary; and
 - (c) such other duties as specifically provided for in the MCCP.
2. Where a matter of administrative practice arises that has not been regulated by the MCCP, the matter must be decided by the president of the courts in [insert name of state].

Commentary

The president of the courts is the most senior judge, being both the president of all the courts in the state and the president of the appeals court. Like the judge administrator (who is responsible only for the administration of an individual trial court), the president is responsible for overseeing administrative functioning. The president must oversee the administration of not only the appeals court but also every trial court in the state. The judge administrators of the trial courts report to the president. The president in turn reports to the competent legislative authority (e.g., the parliament). Whereas the judge administrator prepares the judge's roster in each trial court, the president is responsible for devising a plan for how cases should be distributed (which may be based in part on the data received from the judge administrators on how their courts are functioning).

Paragraph 1(c) refers to other duties of the president of the courts. In this regard, reference should be made to Article 4(4) (on the duty of the president to resolve disputes over territorial jurisdictions of trial courts), Article 273 (on the duty of the president to convene a conditional release panel in certain cases), and Article 322 (on the duty of the president to convene special panels for juveniles).

Section 2: The Registry

Article 23: Registry

A registry for each trial court and the appeals court must be established.

Article 24: Responsibilities of the Registry

The registry of each trial court and the appeals court is responsible for:

- (a) the nonjudicial aspects of the administration of each court, including but not limited to the receipt of documents to be filed in the court, the organization and storage of court documents, the security of court documents, and the service of documents; and
- (b) such other responsibilities as provided for in the MCCP.

Commentary

Each court will have an individual registry to facilitate its work. A registry's work is varied and includes receipt of filed documents at the public counter (e.g., motions, applications) that are then distributed to the relevant judge; service of documents (e.g., court decisions, court orders, witness summons); receipt of monies (e.g., fines or applicable court fees); payment of witness fees and expenses; case management and tracking (which may include the creation of a case record and file folder, indexing, scheduling of court dates, and the gathering of data and statistics on court activities); dealing with public inquiries; and the organization and storage of official court documents. Staff of the registry may also play an active role in assisting the judge during court proceedings (e.g., by calling the court to order, calling the cases to be heard in turn, swearing in witnesses and interpreters, maintaining log notes and minutes of the proceedings, writing up all warrants or orders for the judge to sign, assisting the judge in scheduling court dates by reference to the court diary, and ensuring that the records of proceedings are preserved). Registry staff, sometimes known as clerks, may have a single assigned role or may play several different roles within the registry. The registry may be divided, for example, into a fines office, a public counter, a typing pool, a records department, a public office, and so forth. In a post-conflict state with limited resources and personnel, this division may not be feasible and staff members may be required to perform a number of different functions.

Even in a post-conflict context, where only limited resources are available, it is essential that this administrative capacity functions effectively; if it does not, judges and courts will not be able to effectively function.

Section 3: Court Staff

Article 25: Court Staff

1. Each trial court and the appeals court must have such qualified staff as may be required for the proper functioning of the court and the discharge of the responsibilities of the judges.
2. The court staff must exercise their duties under the direction of the judge administrator of the trial court or the president of the appeals court.

Part 6: Administration of Courts

Section 1: Filing Submissions to the Courts

Article 26: Submissions to the Courts

1. All written submissions to the court, including motions, applications, written indictments, appeals, or other statements, must be filed with the registry of the competent court.
2. Where the MCCP provides that a submission may be made orally before the court, the submissions must be entered verbatim into the record of the proceedings.
3. Submissions must be comprehensible, must comply with the provisions of the MCCP, and must contain everything necessary for them to be acted upon.
4. Where a submission is filed that is incomprehensible or where it does not contain everything necessary for it to be acted upon, the competent court must summons the person making the submission to correct or supplement the submission within a specified period of time.
5. Where a person summonsed to correct or supplement a submission does not do so within the period of time set down by the competent court, the court must reject the submission.
6. The summons to correct or supplement the submission must warn the person making the submission of the consequences of his or her failure to correct or supplement the submission within the period of time set down by the court.

Section 2: Service of Documents by the Courts

Article 27: Service of Documents

1. Service of documents and other official court materials, including summonses, orders, decisions, indictments, judgments, or documents whose

delivery is required under any provision of the MCCP, must be made in the following manner:

- (a) where the recipient can be found in [insert name of state], by hand delivery to the recipient, in duplicate, by an appointed document server. The original must be left with the recipient, who must acknowledge service by signing the copy, which shall promptly be filed at the registry of the competent court. If the recipient cannot read or write, a thumbprint will suffice. If the recipient refuses to acknowledge service, service is nevertheless complete if the server certifies the refusal and the time, date, and place of delivery. Such certification may be made on the copy that is filed at the registry; or
 - (b) if the recipient cannot be found, after reasonable efforts have been made to find the person, service may be effected by affixing the documents in a conspicuous manner to the premises or last address of the recipient in [insert name of state]. Service is complete if the document server witnesses the act and certifies the time, date, place, and manner of service. Such certification may be made on the copy that is filed at the registry of the competent court, together with a statement by the server who attempted to deliver the relevant documents or other official court materials.
2. Documents or other official court materials must be served upon a prosecutor at the office of the prosecutor or the office of the chief prosecutor, depending upon the location of the prosecutor to whom the document is being served upon.
 3. Service of documents or other official court materials upon a detainee or a convicted person must be done through the detention center where he or she is detained and upon his or her counsel.

Commentary

The method by which documents are served varies around the world. In some states, where the postal service is reliable, service of documents is effected through the use of registered post. Where there is no reliable postal service (as is often the case in post-conflict states), documents must be served in person by an individual who is appointed by the court registry to serve the document. In exceptional cases in some states, where a person cannot be located or is evading service of a document, service can also be effected through “substituted service,” which involves publication either in a newspaper or in the community where the person lives.

The MCCP requires that service be undertaken by a “document server.” This person may be employed either full-time or part-time by the registry of the competent court. Documents and other materials should be delivered by hand to the residence of the person being served, except where the person being served is the prosecutor or a detainee or convicted person, as per Paragraphs 2 and 3.

Section 3: Court Summonses

Subsection 1: Summons of a Suspect or an Accused

Article 28: Summons of a Suspect or an Accused

The court must summons a suspect or an accused to appear at court hearings (including a confirmation hearing under Article 201), a trial, or an appeal.

Commentary

Where a suspect or an accused is held in pretrial detention, the detention authority is responsible for bringing the person before the court when required. Where a suspect or an accused is not held in detention, the court must inform the person when his or her presence in court is necessary by way of summons. A summons is an official court-ordered document that legally requires a person who is summonsed to appear in court. Once summonsed, the suspect or the accused has a legal obligation to appear before the court; failure to appear will put the suspect or accused at risk of apprehension under Article 41.

Article 29: Service of a Written Summons on a Suspect or an Accused

1. A written summons must be served on a suspect or an accused in accordance with Article 27.
2. The written summons must indicate:
 - (a) the name of the competent court issuing the summons;
 - (b) the first name, surname, and address of the suspect or the accused;
 - (c) an indication that he or she has been summonsed as a suspect or an accused;
 - (d) the criminal offense or offenses for which the person is suspected or accused;

- (e) the name of the criminal case and the case number in connection with which he or she is summonsed;
 - (f) where and when the suspect or accused is to appear;
 - (g) a warning that the suspect or the accused will be apprehended if he or she fails to appear before the court at the time and place specified by the court and that he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC;
 - (h) that the suspect or the accused is required to immediately inform the prosecutor and the competent court of any change in his or her address and of any intention to change address; and
 - (i) the date and signature of the competent judge.
3. The first time the suspect or accused is summonsed, he or she must be informed of his or her rights under Articles 54–71 and 172.
 4. A child under the age of sixteen years old must be summonsed through his or her parents, adoptive parents, foster parents, guardian, or legal representative.
 5. Where the suspect or the accused is detained, the summons must be served through the detention center where he or she is detained and upon his or her counsel.

Article 30: Oral Summons of a Suspect or an Accused

1. The competent court may orally serve a summons on a suspect or an accused who is before the court.
2. When an oral summons is delivered to a person who is before the court, the court must give the suspect or the accused instructions that he or she will be apprehended if he or she fails to appear before the court at the time and place specified by the court and he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC.

Article 31: Apprehension Order against a Suspect or an Accused for Failure to Comply with a Summons

1. Where the suspect or the accused fails to appear at proceedings and does not justify his or her absence, the court may postpone the proceedings and make an apprehension order against the suspect or the accused.
2. The apprehension order must be in writing and must contain:
 - (a) the name of the competent court issuing the summons;
 - (b) the first name, surname, and address of the suspect or the accused;
 - (c) the criminal offense or offenses for which the person is suspected or accused;
 - (d) the name of the criminal case and the case number in connection with which he or she is summonsed;
 - (e) the grounds for ordering that the person must be apprehended;
 - (f) the date and time when and the place where the person is to be brought before the court; and
 - (g) the date and signature of the competent judge.
3. The police must execute the apprehension order on the date specified in the order. The police must bring the apprehended person to the court designated in the order at the time specified.
4. The police officer executing an apprehension order must hand the order to the suspect or the accused and instruct him or her to follow the officer. If the suspect or accused refuses, he or she may be apprehended by the use of reasonable force.
5. If the suspect or the accused justifies his or her absence before apprehension, the court must revoke the apprehension order.

Commentary

The purpose of an apprehension order is to make the person who is the subject of the order appear before the court on a certain date. An apprehension order should not be confused with a warrant for detention, which requires that a person be detained in a detention center pending trial. An apprehension order gives the police only the power

to apprehend a person and to bring that person directly before the court. Where a suspect or accused fails to appear before the court, the court may, instead of issuing an apprehension order, issue an arrest warrant under Article 171(2)(b) on the basis that there are grounds justifying the detention of the person who has failed to appear before the court (Article 171[2][b] refers to Article 177[2][a] as a grounds of arrest; Article 177[2][a] provides that a person may be detained if there is reason to believe the person may flee to avoid proceedings which could support a warrant for detention. Where a suspect or an accused has failed to appear before the court when required, this failure may serve to substantiate the belief that the person may flee to avoid proceedings). Where an arrest warrant is issued under Article 171, the procedure set out in Article 172 and Article 173 must be adhered to.

Subsection 2: Summons of a Witness or an Expert Witness

Article 32: Summons of a Witness or an Expert Witness

1. A person may be summonsed as a witness to give evidence in criminal proceedings if there is a likelihood that he or she possesses information relevant to the criminal proceedings.
2. An expert witness may be summonsed as a witness to give evidence in criminal proceedings on account of his or her knowledge, skill, experience, training, or education in a particular area of scientific, technical, or other specialized knowledge.
3. Any person summonsed as a witness or expert witness has a duty to respond to the summons and, unless otherwise provided for in the MCCP or in the applicable law, to testify before the court.

Article 33: Service of a Written Summons on a Witness or Expert Witness

1. Except as provided for in Article 34, a written summons must be served on a witness or expert witness in accordance with Article 27.
2. The written summons must indicate:

- (a) the name of the competent court issuing the summons;
 - (b) the first name, surname, and address of the witness;
 - (c) where and when the witness must appear;
 - (d) the name of the criminal case and the case number in connection with which the witness or expert witness is summonsed;
 - (e) an indication that the witness or expert witness has been summonsed as a witness or expert witness;
 - (f) a warning that the witness or expert witness will be apprehended if he or she fails to appear before the court at the time and place specified by the court and that he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC; and
 - (g) the date and signature of the competent judge.
3. A child under the age of sixteen years old must be summonsed through his or her parents, adoptive parents, foster parents, guardian, or legal representative.

Commentary

A summons is an official court-ordered document that legally requires a person to appear in court either as a witness or an expert witness. The person served with a summons must come before the court and testify at the time and location specified in the summons unless there is another legal provision that gives the witness the right not to testify (e.g., where the person falls into the category of those not required to testify under Articles 243 and 244).

Article 34: Oral Summons on a Witness or an Expert Witness

1. The competent court may orally serve a summons on a person who is before the court.
2. When an oral summons is delivered to a person who is before the court, the court must give the witness or the expert witness instructions that he or she will be apprehended if he or she fails to appear before the court at the time

and place specified by the court and that he or she may be subject to an order for noncompliance with a court order under Article 41 or, in the alternative, may be prosecuted for failure to comply with an order of the court under Article 92 of the MCC.

Article 35: Apprehension Order against a Witness or an Expert Witness for Failure to Comply with a Summons

1. Where a witness or expert witness fails to appear or to justify his or her absence, the court may:
 - (a) impose a fine of up to [insert amount]; or
 - (b) order the apprehension of the witness or expert witness.
2. The apprehension order must be in writing and must contain:
 - (a) the name of the competent court issuing the summons;
 - (b) the first name, surname, and address of the person to be apprehended;
 - (c) the name of the criminal case and the case number in connection with which he or she is summonsed;
 - (d) the grounds for ordering that the person must be apprehended;
 - (e) the date and time when and the place where the person is to be brought before the court; and
 - (f) the date and signature of the competent judge.
3. The police must execute the apprehension order on the date specified in the order. The police must bring the apprehended person to the court designated in the order at the time specified.
4. The police officer executing an apprehension order must hand the order to the person to be apprehended and instruct him or her to follow him or her. If the person refuses, he or she may be apprehended by the use of reasonable force.
5. If the apprehended person justifies his or her absence before apprehension, the court must revoke the apprehension order.

Commentary

If a person fails to appear before the court, he or she may be apprehended on the authority of an apprehension order issued by the judge. As discussed in Article 31, an apprehension order should not be confused with a warrant for detention or an arrest warrant. The sole purpose of an apprehension order is to bring the apprehended person before the court. Once brought before a judge, the judge may impose a sanction upon the witness or expert witness for noncompliance with a court order in accordance with Article 41. In the alternative, he or she could also be liable for the criminal offense of failure to respect an order of the court under Article 197 of the MCC.

Subsection 3: Summons of a Police Officer, a Detention Authority Official, or a Member of the Military

Article 36: Summons of a Police Officer, a Detention Authority Official, or a Member of the Military

A summons must be served on a police officer, a detention authority official, or a member of the military through their command or immediate superior.

Part 7: Provisions Relating to Court Proceedings

Section 1: Court Records

Article 37: Records of Court Proceedings

1. A record of every court hearing must be made.
2. The recording must be made by the court.
3. The record must be in writing or by way of video, digital, or tape recording.
4. The record must contain:
 - (a) the time, date, and place of the hearing;
 - (b) the name of persons present at the hearing, including the competent judge or judges, the prosecutor, the suspect or accused, counsel for the suspect or the accused, witnesses, expert witnesses, interpreters, and court staff in attendance;
 - (c) a written, typed, shorthand, stenographic, digital, video, or tape recordings of the proceedings;
 - (d) a verbatim record of any orders made by the court or any orders requested by the prosecutor or the defense;
 - (e) a verbatim record of any oral summonses issued by the court in accordance with Article 30 or 34; and
 - (f) a verbatim record of any other decision made by the court.
5. Where the record is in writing, the pages must be numbered and the competent judge must read the record made by the recording clerk for accuracy, sign each page, and place the court seal on the document.
6. The written, digital, video, or tape recordings of proceedings must be preserved and stored in a secure location by the registry.
7. Except as otherwise provided in the MCCP, the record of the proceedings must be made available, upon request, to the prosecutor, to the defense, and in appropriate cases to counsel for the victim.

Commentary

As discussed above in the commentary to Article 24, each judge or panel of judges will be assisted during the proceedings by a staff member of the registry. It is the responsibility of the registry staff member to ensure that an accurate record of the proceedings is kept throughout the proceedings.

A variety of methods are currently used to create a court record: handwritten court reports (often in summary form rather than verbatim); cassette or video recording; traditional pen-based stenographic reporting techniques; and verbatim technologies such as stenotyping and video and audio recording. Some of these methods are extremely sophisticated and expensive. For example, computer-aided transcription (CAT) uses a computer steno machine equipped with a diskette drive that must be operated by a court stenographer. Real-time reporting is an even more sophisticated recording technique, which instantly converts the words spoken in the courtroom into computerized text. Given the expense of installing and maintaining such recording methodologies, they may not be suitable for an underresourced criminal justice system in a post-conflict state. There are, however, a variety of other, less expensive options. When considering the options appropriate for a post-conflict state, thought should be given to the cost both of installing and maintaining equipment and of acquiring necessary supplies (e.g., videocassettes, discs, paper, pens, and so forth). Video recording of proceedings may be an option, although probably not in every courtroom and case given its expense. Creating a stenographic record of proceedings either through a machine or through handwritten stenographic notes may also be considered, although this method requires a larger number of competent stenographers than many post-conflict states can muster. Therefore, the most common method of recording court proceedings is to use reel-to-reel audiocassettes or to create a handwritten court report. Audiocassette recording of proceedings is preferable as it provides a verbatim record. It is extremely difficult and labor-intensive to create an accurate handwritten court record; however, it may be the only option in certain states. Paragraph 4 sets out a number of minimum requirements for the written record. In accordance with Paragraph 5, the competent judge is required to thoroughly review and approve the written record by signing and placing the court seal on it. This is an important oversight function and helps prevent the threat of bribery of court officials in exchange for altering the court record, which has proved to be a problem in states where written records are the only means of recording court proceedings.

It is the responsibility of the registry to preserve and store records of court proceedings. The registry is also responsible for making the records of proceedings available to the parties and, in certain circumstances, to the victim. Where the court proceedings are recorded by audiocassette, the registry will normally copy the cassettes and provide them to a party requesting the record. In the case of written records, the registry will photocopy the written records or grant the right of access to the original records. Records of proceedings that are closed or confidential (e.g., hearings on cooperative witnesses under Article 166, and hearings on witness protection measures or witness anonymity under Articles 152 and 160) will be made available only to those persons specified in the MCCP. For example, the records of witness anonymity hearings will be available to the competent judge, the prosecutor, and the defense (but only

where the motion for witness anonymity is brought by the defense; where a motion for witness anonymity is brought by the prosecutor, the defense will not have access to the record of the hearings). Such records must be stored separately for general court records under lock and key as required by Article 160.

In some states and particularly in post-conflict states, court proceedings may be monitored by local or international bodies. For example, in post-conflict Liberia, United Nations human rights officers have been tasked with monitoring court proceedings. Similarly in post-conflict Kosovo, the Organization for Security and Cooperation in Europe was given a mandate to monitor and report on the conduct of criminal cases. In other locales, a court monitoring function may be assumed by a non-governmental organization. In post-conflict East Timor, the Judicial System Monitoring Programme was established in April 2001 to monitor the processes of the newly established Ad Hoc Human Rights Tribunal in Indonesia and the Special Panels for Serious Crimes. The Judicial System Monitoring Programme later extended its work to court monitoring and judicial system analysis of domestic courts. Considerable debate surrounds the right of international and national human rights monitoring bodies to have access to court records that are confidential. Some argue that monitoring bodies should have access to all court documents if they are to fully monitor the functioning of the criminal justice system. In contrast, others argue that granting full access to monitors may adversely affect the proceedings. The possibility that external monitors may divulge confidential information and endanger the investigation, prosecution, or safety of victims and witnesses leads many to believe that full access should not be granted to monitors. The MCCP does not contain a provision or statement on the right of access by court monitors to court records, although this issue was discussed in detail during the drafting of the MCCP. In the end, the drafters decided that the relevant national authorities should decide which monitors should have access to court records, in full knowledge of what organization the monitors are from. It is important to balance the need to facilitate oversight of the criminal justice system by human rights monitors against the need to ensure that the investigation of offenses and the safety of victims and witnesses are safeguarded. A directive should be prepared on the issue of human rights monitors' access to the records and safeguarding of sensitive information by the president of the courts, in addition to necessary memoranda of understandings (MOUs) between the court system and the relevant local or international monitoring organization. In post-conflict East Timor, the government's Directive 2005/6 prohibited access to case files, except for persons who are direct parties to a case, have a "legitimate reason justifying such access," and have obtained authorization from the judge handling the case.

The MCCP does not address the issue of what constitutes public records. However, the judgment in a case must be made public in order to comply with Article 62(3) of the MCCP and international human rights law. Beyond this, policies and procedures will need to be set in place to regulate what documents and records can be made available to the public at its request.

Article 38: Records of Other Actions Taken by Judges and the Registry

1. A written record of all actions in a criminal case not covered in Article 37 must be made by an individual judge at the same time as the action is undertaken or, if that is not possible, immediately thereafter.
2. A written record of all actions taken by the registry in a criminal case must be made at the same time as the action is undertaken or, and if that is not possible, immediately thereafter.

Commentary

In order to advance the purposes of effective, efficient, and fair investigations and prosecutions as set out in Article 2 of the MCCP, all criminal justice actors (judges, police, defense counsel, and prosecutors) must be vigilant in their recording of actions taken with regard to each case. Accurate record keeping is important from the perspective of the prosecution in building a sound and thorough case against the accused person. It is also important that the accused person have full information on the actions taken against him or her so that the accused can fully mount his or her defense.

Under Article 29, a judge is required to note any action taken. This note will be placed in the court file prepared by the registry, along with other relevant documentation such as search warrants, applications for search warrants, decisions, and orders.

Section 2: Change of Location of Court Proceedings

Article 39: Change of Location

1. The court may decide to hold a hearing in a place other than the seat of the court when it considers a change of location to be in the interests of justice or where reasons of necessity require a change of location.
2. The prosecutor or the defense in a case may file a motion with the registry of the competent court for a change of location.
3. In deciding upon the motion for a change of location, the court must be guided by the particular circumstances of the case and the responsibility of the court to facilitate equal access to justice.

Commentary

A change of location entails the transfer of a hearing or a trial from the courthouse of the court of competent jurisdiction to another location. The change of location can be initiated by the court itself or through the motion of the prosecutor or the defense. A change in location does not entail a change in the competent judge or panel of judges. The same judge or judges will hear the motion or the case but in a different location.

The court may choose to change locations for various reasons. For example, in a high-profile serious crime case, hearing a case in the regular location may pose a security risk; that risk could be reduced by moving to a more secure courthouse. The change in location may be temporary or it may be permanent. It may involve moving from one courthouse to another, or from a courthouse to a different kind of facility. A common occurrence in states with limited resources (including vehicles to transport prisoners to and from court) is for the judge to relocate to a detention center to hear several applications or motions for detention in one sitting. This is cost-effective and affords detainees due access to justice. This sort of change in location would be permissible under the MCCP.

Section 3: Control of Court Proceedings

Article 40: Sanctions for Misconduct before a Court

1. A court may sanction a person present before it who engages in misconduct before it, including a person who disrupts court proceedings.
2. The court may, after giving a warning as to the consequences of his or her misconduct, sanction a person present before it by:
 - (a) permanently or temporarily removing a person from the courtroom; or
 - (b) imposing a fine not exceeding [insert amount of fine], or a term of imprisonment not exceeding one week, upon a person who engages in misconduct before a court.
3. A fine or a term of imprisonment imposed under Paragraph 2(b) may be appealed under Article 295 of the MCCP.

Commentary

Reference should be made to Articles 189–197 of the MCC, which set out related administration of justice offenses. In those MCC articles, the offense of failure to respect an order of the court is of particular relevance. In contrast to the sanctions provided under Article 40, which may be imposed summarily during a hearing or during the trial in question, a person must be charged with and tried in a separate trial for the administration of justice offenses contained in the MCC.

Reference should be made to Article 295 on the interlocutory appeal mechanism, by which an order under Article 40(2)(b) may be appealed.

Article 41: Sanctions for Noncompliance with a Court Order

1. A court, after giving a warning as to the consequences of noncompliance with a court order, may:
 - (a) detain a person, except a suspect or an accused, who refuses to comply with an order of the court, until such time as he or she complies or until compliance becomes irrelevant; or
 - (b) impose a fine upon the person not exceeding [insert amount of fine].
2. The term of detention imposed by the court under Paragraph 1(a) must not exceed four weeks.
3. A term of detention imposed by the court under Paragraph 1(a) may be appealed under Chapter 16 of the MCCP.
4. A fine imposed by the court under Paragraph 1(b) may be appealed under Article 295 of the MCCP.

Commentary

Reference should be made to Article 197 of the MCC, “Failure to Respect an Order of the Court.” In contrast to Article 41, which provides for immediate coercive action on the part of the court, Article 197 provides for ex post facto prosecution of a failure to comply with orders of the court and must be addressed by separate criminal proceedings.

Article 41 applies to witnesses and expert witnesses who fail to comply with a summons to appear before the court. It also applies to persons who breach other court orders, such as a production order under Article 131.

As set out in Article 41(3), the provisions on habeas corpus contained in Articles 339–346 apply to a person detained under Article 41 as they apply to all cases where any person is deprived of his or her liberty. Reference should be made to the commentaries to Articles 339–346 for further discussion. Reference should also be made to Article 295 with regard to an appeal of a fine imposed upon a person for noncompliance with a court order.

Chapter 3: Other Actors in Criminal Proceedings

Part 1: Prosecution Service

Commentary

There are a number of different types of prosecutorial models found around the world. In some systems, the investigation and prosecution of a case are conducted by different actors; the police independently conduct the investigation and then hand over evidence to a prosecutor, who then brings the case before the court. In other systems, the prosecutor is responsible both for prosecuting the case and for directing the police in the investigation of the case. In yet other systems, the prosecutor may work in tandem with an investigating judge and the police in the investigation and prosecution of a case. The prosecutor directs the police in the early stages of the investigation and initiates proceedings, whereupon an investigating judge gathers the evidence and creates a case file (or “dossier”) that is then submitted to the court. Under this system, the investigating judge has broader powers relating to the investigation than a prosecutor does in other systems. For example, the investigating judge may order searches of persons and property and other investigative measures, whereas in other systems the prosecutor would be required to submit a motion and obtain an order from the court.

The drafters of the MCCP debated at length over which prosecutorial model they should adopt. Some experts favored the investigating judge model. They argued that in a post-conflict state, which typically lacks defense counsel, it would be difficult to attain “equality of arms” (this concept is discussed in the commentary in Article 62) and that therefore it would be preferable to have impartial investigating judges, who could protect the interests of both the prosecution and the defense. Those experts who opposed the use of the investigating judge model pointed out that its popularity has been declining for many years, and that many states that had once embraced it had now abandoned it. They also argued that it was better to decentralize power in the investigation and prosecution of criminal cases given the security risks to judges in post-conflict states and the risk of pressure being brought to bear on them by those associated with the accused in cases involving, for example, organized crime or the politically powerful. A third argument against the investigating judge model was that it is overly complex for use in a post-conflict state.

Ultimately, the drafters of the MCCP decided upon a hybrid prosecutorial model whereby an independent prosecutor charged with investigating incriminating and exonerating evidence equally is responsible for overseeing the investigation of a criminal case (which will be conducted by the police under the direct orders of the prosecutor) and for bringing a case before the court. Through the establishment of the

prosecutorial model set out in the MCCP, some concerns about ensuring equality of arms in a post-conflict state are addressed, as the prosecutor is under an affirmative duty to gather evidence both for and against the suspect. The fact that the power to investigate is spread out ensures that no one person is responsible for the entire investigation and therefore reduces the risk of that person being threatened or bribed.

States usually have very detailed legislation in place that regulates their prosecution services. The state's constitution may contain provisions on the prosecution of criminal offenses and the allocation of the power to do so. In addition, there may be specific legislative acts, court rules, or circulars dedicated to the prosecution service. The MCCP primarily addresses the procedural component of criminal law rather than the institutional component. Therefore, the provisions contained in the MCCP are not exhaustive by any means. They merely set out a skeletal framework and provide some basic principles on a prosecution service, just as Chapter 2 sets out a skeletal court system. More detailed legislation is required on matters such as the organization, management, accountability, and operation of the prosecution service; and the qualifications required of its staff and their selection, training, status, and conditions of service. Codes of ethics and provisions on the accountability, integrity and performance of prosecutors are also required.

Reference should be made to the United Nations Guidelines on the Role of Prosecutors; the International Association of Prosecutors' Standards of Professional Responsibility and Statement of Essential Duties and Rights of Prosecutors; and the Council of Europe Recommendation (2000)19, or the Role of Public Prosecution in the Criminal Justice System.

Section 1: Organization and Composition of the Prosecution Service

Article 42: Organization of the Prosecution Service

1. The prosecution service is composed of:
 - (a) the office of the chief prosecutor;
 - (b) the office of the prosecutor in [insert area over which the office has jurisdiction];
 - (c) the office of the prosecutor in [insert area over which the office has jurisdiction]; and
 - (d) the office of the prosecutor in [insert area over which the office has jurisdiction].

Commentary

Article 42 provides that an office of the chief prosecutor be established. Other offices of the prosecutor must be established in the state. These offices may be established in the same geographical area as each trial court (see Article 4 of the M CCP), depending on how many trial courts are established.

Article 43: Composition of the Office of the Chief Prosecutor

1. The office of the chief prosecutor is composed of a chief prosecutor, a deputy chief prosecutor, and general staff.
2. The chief prosecutor, deputy chief prosecutor, and prosecutors are designated by the [insert appointing authority].
3. The general staff are appointed by the chief prosecutor.
4. The role of the chief prosecutor is as the principal official and administrative head of the prosecution service and the office of the chief prosecutor and he or she is responsible for its overall management and ensuring the due exercise of its functions.
5. The role of the deputy chief prosecutor is to serve in the place of the chief prosecutor when the chief prosecutor is unable to carry out his or her functions.

Article 44: Composition of the Offices of the Prosecutor

1. Each office of the prosecutor is composed of a deputy prosecutor, prosecutors of the office of the prosecutor, and general staff.
2. The deputy prosecutor and the prosecutors are designated by the [insert appointing authority].
3. The general staff are designated by the deputy prosecutor.

4. The deputy prosecutor is the principal official of each office of the prosecutor. He or she must report directly to the chief prosecutor with respect to the discharge of functions of the office of the prosecutor.
5. The role of prosecutors is to exercise prosecutorial authority relating to criminal investigations and criminal proceedings of the office of the prosecutor.

Section 2: Duties of the Prosecution Service and Duties of Prosecutors

Article 45: Duties of the Prosecution Service

The duties of the prosecution service are to:

- (a) examine any information on criminal offenses committed in [insert name of state];
- (b) direct and supervise the investigation of criminal offenses and the collection of evidence by the police;
- (c) conduct investigations and prosecutions before the courts of [insert name of state]; and
- (d) undertake such other responsibilities as provided for in the MCCP.

Commentary

Article 45 sets out the broad duties of the prosecution service as the body responsible for investigating and prosecuting criminal offenses and, as part of this, for directing the police in the investigation of criminal offenses. Reference should be made to Article 53 that sets out the corresponding duties of the police to follow the directions of the prosecutor in undertaking investigative measures.

Article 46: Duties of Individual Prosecutors

In the exercise of their duties, prosecutors must:

- (a) extend the investigation of criminal offenses to cover all facts and evidence relevant to an assessment of whether a suspect or an accused is criminally responsible, and, in doing so, to investigate incriminating and exonerating circumstances equally;
- (b) take appropriate measures to ensure the effective investigation and prosecution of criminal offenses in [insert name of state], and, in doing so, respect the interests and personal circumstances of victims and witnesses and take into account the nature of the criminal offense, in particular where it involves sexual violence, gender violence, or violence against children;
- (c) to oversee the lawfulness of the actions of the police in a criminal investigation; and
- (d) fully respect the rights of suspects, accused persons, and other persons under the MCCP and to take affirmative action on every violation of human rights.

Commentary

As discussed in the general commentary to Chapter 3, Part 1, of the MCCP, prosecutors are responsible for examining evidence both in favor of and against a suspect or an accused person. Prosecutors not only are required to act in the interests of the prosecution of a case but also have an affirmative duty to take investigative measures that may reveal exonerating evidence. This is especially important where the accused does not have legal representation.

Paragraph (b) notes the requirement to take into account, in particular, the interests of victims and witnesses in cases concerning sexual violence, gender violence, or violence against children. The MCC sets out a number of such offenses. Part II, Section 3, addresses sexual offenses; Article 105 addresses domestic violence while Part II, Section 5, sets out a number of offenses against children. The commentaries to these articles discuss the fact that sexual and gender violence and violence against children are often inadequately addressed in post-conflict states. In some post-conflict states, victims of gender or sexual violence or violence against children have reported that the police or prosecution service has not taken its allegations seriously. With this fact in mind, Article 74 requires that due regard be given to the victims of these offenses. To enforce this obligation, sensitization and training of prosecutors are prerequisites. It

may also be useful to consider establishing special units within the prosecution service to deal specifically with gender and sexual violence and violence against children. It is also important to consider the provision of victim and witness services such as counseling and medical and psychological assistance. Reference should be made to Article 79 and its accompanying commentary for further discussion.

In some legal systems, prosecutors are under a “duty to prosecute,” meaning that they have no discretion about whether to prosecute a particular case if the facts reveal a reasonable suspicion that a criminal offense has taken place. This obligation is not contained in the MCCP. There are specific and defined instances set out in the MCCP where a prosecutor may decline to prosecute a particular case through not initiating a formal investigation under Article 96 or through discontinuing an ongoing investigation under Article 98. The prosecutor has some discretion, although this is structured and clearly delineated in the MCCP and is checked in certain instances by the chief prosecutor in accordance with Guideline 17 of the Guidelines on the Role of Prosecutors, which reads: “In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including waiver of prosecution.” Reference should be made to Articles 96 and 98 and their accompanying commentaries.

Section 3: Independence and Impartiality of the Prosecution Service and of Prosecutors

Article 47: Independence of the Prosecution Service

1. The prosecution service must be independent.
2. Independence entails:
 - (a) institutional guarantees of insulation from pressure; and
 - (b) guarantees of actual as well as the appearance of unbiased adjudication.

Commentary

Guideline 4 of the United Nations Guidelines on the Role of Prosecutors requires that states ensure “that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper influence or unjustified exposure to civil, penal or other liability.”

Just as judicial independence is multifaceted, so too is prosecutorial independence, including institutional or functional and individual aspects. Paragraph 2(a) sets out the required institutional or functional independence of the prosecution service. Paragraph 2(b) provides for the personal independence of prosecutors. Guideline 6 of the United Nations Guidelines requires that reasonable conditions of service, adequate remuneration, and, where applicable, tenure, pension, and age of retirement of prosecutors all be set out by law or published rules or regulations. These conditions are fundamental elements of ensuring the personal independence of prosecutors. This paragraph also underscores an important point: independence must be assessed from both an objective and a subjective perspective.

Article 48: Insulation from Pressure

1. Prosecutors must perform their duties independently and in accordance with the applicable law and their solemn declaration.
2. No state entity, private or public organization, or national or international organization or person may influence, seek to influence, or appear to influence prosecutors.
3. Prosecutors must also be independent from pressure from within the prosecution service.

Commentary

The insulation of the prosecution service as a whole and the individual prosecutors within it are crucial elements of prosecutorial independence set out in Article 47(2)(a) as recognized in Guideline 4 of the United Nations Guidelines on the Role of Prosecutors. A prosecutor must carry out his or her duties in accordance with the applicable law and the solemn declaration that he or she makes upon being appointed a prosecutor. Prosecutors must be insulated from two types of pressure: external and internal. External pressure means pressure from external entities, for example, the executive, the legislative, an international organization, or a private person. Internal pressure is exerted from within the prosecution service.

Article 49: Impartiality of Prosecutors

1. Prosecutors must act without prejudice and without improper influence of a direct or indirect nature from any source or for any reason.
2. Prosecutors must uphold the appearance of impartiality by excusing themselves when reasonable to do so under Article 50. A prosecutor who should but who does not excuse himself or herself under Article 50 must be disqualified under Article 51 on the basis of lack of impartiality.
3. Prosecutors must not engage in activities or maintain interests in activities or entities that affect their impartiality.

Commentary

Guideline 13(a) of the United Nations Guidelines on the Role of Prosecutors requires that prosecutors carry out their functions impartially. The concept of impartiality requires that a prosecutor act without favor, bias, or prejudice in the adjudication of a criminal case. A prosecutor who holds a bias or prejudice relating to a person who is party to the proceedings (e.g., the accused person) or who has personal knowledge of the disputed facts of the case cannot be considered to be impartial. Moreover, a prosecutor must not have a vested interest in a case. A vested interest occurs where the prosecutor has an economic or other interest in the outcome of the case or where he or she has a spousal, parental, or other close family, personal, or professional relationship or a subordinate relationship with any of the parties.

As alluded to in Paragraph 3, a prosecutor must act to ensure that there exists neither actual nor perceived partiality, meaning he or she must be both objectively and subjectively impartial. A prosecutor may objectively appear not to be impartial where he or she partakes in certain activities outside the scope of his or her work or where, for example, the prosecutor has expressed opinions, through the media, in writing, or in public actions that, objectively, could adversely affect his or her required impartiality. In some instances, prosecutors are barred from certain extra-career activities in order to secure the perception of objective independence. This prohibition usually does not include teaching but may include involvement in certain business activities.

Article 50: Excusal of a Prosecutor on Account of Lack of Impartiality

1. A prosecutor must not participate in a case if he or she:
 - (a) is a victim of the criminal offense;
 - (b) is a relative of the judge, defense counsel, the victim, the counsel for the victim or the suspect or accused; or
 - (c) has taken part in the proceedings as a defense counsel or a counsel for the victim or has been examined as an expert witness or witness.
2. A prosecutor may not participate in a case where, apart from the instances set out in Paragraph 1, his or her impartiality might reasonably be doubted on any ground.
3. Where the impartiality of a prosecutor is compromised or is in doubt, the prosecutor must make a request to the chief prosecutor to be excused from participating in a particular case.
4. A prosecutor seeking to be excused from his or her functions must make a written request to the chief prosecutor, setting out the grounds for the request.
5. The chief prosecutor must treat the request as confidential.
6. The chief prosecutor must deliver a decision on whether the requesting prosecutor will be excused from the particular case in question.
7. Where a request for disqualification is granted, the chief prosecutor must assign a new prosecutor to the case and ensure that the prosecutor who is the subject of the request takes no further part in the case.
8. All actions of the prosecutor who has been disqualified that were taken before he or she was excused by the chief prosecutor are deemed valid until the time when he or she is excused by the chief prosecutor.

Commentary

Article 50 provides a mechanism for a prosecutor who believes that his or her impartiality—real or perceived—is in doubt to excuse himself or herself from the case. Paragraph 1 lays out specific instances, based on the general principle set out in Article 49 (and similar to those contained in Article 17 on judicial impartiality), in which a prosecutor must excuse himself or herself on account of a lack of impartiality, either real or perceived. Paragraph 2 provides a general residual provision covering other circumstances in which the impartiality of a prosecutor may be doubted.

Article 51: Disqualification of a Prosecutor on Account of Lack of Impartiality

1. A suspect, an accused, or his or her defense counsel, or a judge may at any time object to the participation of a particular prosecutor in a case where the prosecutor's impartiality is in doubt.
2. A request for disqualification of a prosecutor does not suspend the proceedings.
3. A written sworn statement must be prepared that states the grounds upon which the request lies. Any relevant evidence must be attached to the statement.
4. The written sworn statement must be submitted to the chief prosecutor.
5. The prosecutor whose impartiality is doubted is entitled to present written submissions to the chief prosecutor.
6. The chief prosecutor must determine whether to grant the request on the basis of the written sworn statement and the evidence accompanying it and the written submissions of the prosecutor in question, if any were presented.
7. Where the request is granted, the chief prosecutor must assign a new prosecutor to the case and ensure that the prosecutor who is the subject of the request takes no further part in the case.

Commentary

Where a prosecutor does not involuntarily excuse himself or herself from a case in which there is actual or perceived partiality on his or her part, Article 51 provides a mechanism for a suspect or accused person or any judge to file a request for the disqualification of the prosecutor on the grounds of lack of impartiality. The request is filed with the chief prosecutor, who is responsible for determining the validity of the claim. This form of disqualification should not be confused with removal from office, which involves a prosecutor being removed permanently on the grounds of "serious misconduct" or "stated misbehavior," for example. Under Article 51, the prosecutor is disqualified from acting in the course of his or her duties only with regard to the particular case in question. Depending upon the circumstances, the issues of lack of impartiality raised during the course of the proceedings may be grounds for further disciplinary action or even permanent removal. The issue of permanent removal from office is normally dealt with in a code of ethics or a separate piece of legislation outside of the criminal procedure code.

Part 2: Defense Service

Article 52: Defense Service

The competent legislative authority must establish a mechanism to provide free legal assistance to indigent arrested persons and accused in accordance with Article 67 and Article 68.

Commentary

Article 52 requires that a defense service be established to provide free legal assistance to those who cannot afford it. The purpose of Article 52 is to highlight the necessity for a defense service and to emphasize that it should be part of the criminal justice system, just as the prosecution service is. Many argue that in post-conflict states most of the focus of institutional reform is on courts and the prosecution service, with less attention being paid to the defense service. Given the importance of a defense service for the proper administration of justice, the drafters of the MCCP decided to require that one be established. Article 54, however, does not specify what such a service should look like, because of the variations that exist around the world.

The requirement to establish a defense service derives from Article 67 and Article 68 of the MCCP. In line with international human rights norms and standards, Article 67 requires that where an arrested or an accused person does not have sufficient means to pay for legal assistance, and where it is in the interests of justice to do so, free legal assistance will be provided to the person. Article 68 sets out a number of instances where free legal assistance is mandatory, such as where the accused is a child, is mute or deaf, or displays signs of mental illness or other mental disabilities; where the person is accused of a criminal offense that carries a potential penalty of fifteen years' or more imprisonment; or where a person is subject to a request for extradition. State practice varies as to when the right to free legal assistance begins to apply ("attaches"). In some systems, free legal assistance is provided only when formal charges have been rendered against a person, in other words, only when the person goes from being a *suspect* as defined in Article 1(43) to being an *accused* as defined in Article 1(1). (The transformation from a suspect to an accused may take place pursuant to an indictment or the filing of police charges against a person, depending on the particular legal system in place. Under the MCCP, a suspect becomes an accused where an indictment is presented to the court under Article 195 and later approved by the court at a confirmation hearing under Article 201.) In other systems, free legal assistance is provided from the moment a person is arrested and held in detention, prior to the rendering of formal charges or an indictment. The latter model is the one that has been adopted in

the MCCP. Reference should be made to Article 67 and its accompanying commentary for further discussion.

Each post-conflict state should determine what its defense service will look like based on the state's unique situation, its resources, any preexisting mechanisms, and the need to ensure "equality of arms" (discussed in the commentary to Article 62). This commentary discusses a variety of options and their advantages and disadvantages.

Few states provide free legal assistance fully and consistently. The difficulty of doing so is exacerbated in post-conflict states struggling to establish, rebuild, or reform institutions and lacking adequate human and materiel resources to provide high-quality legal aid to all who need it, especially those who come from marginalized groups. Despite the scale of the challenge, every effort must be made to establish a legal aid system. Two mechanisms are generally used to provide free legal assistance: *legal representation* and *legal advice*. *Legal representation* is provided to an arrested person or the accused person by a qualified lawyer, who has the ability to advocate for the person in court. *Legal advice* may be provided by a lawyer, of course, but it may also be provided by a range of other actors, for example, paralegals, who are not lawyers by profession but who are trained to advise in criminal matters.

Turning to legal representation first, it is preferable that an arrested or accused person be represented by a qualified lawyer. Various methods are used around the world to provide free legal assistance, or legal aid, to indigent persons. Many states have legislation that sets forth the mechanisms for provision of legal aid. One method for providing legal aid is through the "list model" or "panel model," while another is through a "defense unit" or the "public defender model." In the first model, counsel is selected from a list of lawyers who have been found to meet specified criteria set out in legislation. Counsel may be paid at an hourly or daily rate or by a flat fee set according to the nature of the case. In the second model, lawyers are hired by the state as full-time, salaried employees of a permanent defense unit led by a full-time chief.

Some experts consulted in preparation of the MCCP expressed a strong preference for the establishment of a fully funded and independent defense unit, such as those units established for the Special Court for Sierra Leone and the Special Panels for Serious Crimes in East Timor. These experts argued that the right to "equality of arms" demands that if a fully funded, independent, and adequately resourced prosecution service of the kind set out in Chapter 3, Part 1, of the MCCP is established, then an equally financed and equally independent defense unit should also be set up. They further argued that the establishment of such a unit signals an institutional commitment to the defense function. A defense unit model may prove less expensive to administer than other models; the experience of the ad hoc tribunals shows that in a list system it may be difficult to avoid delays, to control costs, and to prevent questionable practices such as the splitting of fees with clients' families. Maintenance of a defense unit, moreover, fosters the development of defense practitioners whose skills are tailored to the court before which they appear. Defense unit lawyers can cultivate an institutional memory that seldom develops in a list system, in which attorneys appear before the court in a sporadic and uncoordinated fashion. The head of a defense unit, meanwhile, not only oversees the work of defense unit staff but also acts as an advocate for the defense bar in administrative discussions regarding the workings of the court. For post-conflict states considering the introduction and establishment of a dedicated

defense unit, a model worth studying is that instituted at the Special Court for Sierra Leone.

Many other experts consulted during the drafting of the MCCP were of the view that, given resource constraints in many post-conflict states, it may be necessary to examine alternative and more pragmatic solutions in order to realize the right to free legal assistance. Setting up a defense unit takes time, they noted. They also argued that there should be no automatic presumption that one model is better than the other; which model of legal aid is appropriate for a given country should be determined according to that country's specific circumstances. Some countries opt against a dedicated defense unit and prefer a well-managed panel program overseen by a legal aid board. Moreover, use of a defense unit model may pose significant problems. If the number of staff lawyers is small, and the accused are many and interrelated, it will be difficult to avoid conflicts of interest in the course of representation. Lawyers not employed by the defense unit may feel shut out; in turn, the exclusion of such lawyers may hamper efforts to build the capacity of the criminal justice system.

In post-conflict situations where lawyers are scarce or untrained to handle serious criminal cases, a hybrid system, in which a defense unit works in tandem with a list of lawyers, might provide a solution to these problems. Even if this model is contemplated at some future time, in the immediate term a list system may be the only option available if accused persons are to have some legal representation.

Other models might also be contemplated, especially where resources are extremely limited. These options relate more to the provision of legal advice than legal representation (which may be rendered only by a qualified lawyer) as they involve the provision of advice by nonlawyers. In some states, such as Malawi and Kenya, and in some post-conflict states, such as South Africa and Sierra Leone, paralegal aid schemes have been established by non-governmental organizations, with nonlawyers being trained in criminal law and procedure in order to provide legal advice to arrested, detained, or accused persons. In some places, the state has agreed to allow paralegals to enter prisons and detention facilities to advise detainees and convicted persons. Permission has also been granted in some states for paralegals to sit in on police interviews and to provide independent advice to arrested or detained persons. One of the main functions of paralegals is to make persons aware of their rights through education. Paralegals also play a role in teaching arrested or accused persons how to conduct themselves in court in order to represent themselves and ensure that their rights are adequately protected. Legal education by paralegals has been pioneered in many inventive ways, such as the establishment of mock courts in prisons and through role playing. Paralegals also attend court during hearings or at trial, and although they cannot speak before the court, they can advise the arrested or accused person.

Paralegal aid schemes have proved a highly successful and resource-saving means of delivering legal advice where the state-run legal aid system is not functional or is incapable of delivering legal aid to all arrested or detained persons. In other systems, law students under the supervision of a qualified mentor handle certain aspects of a criminal case. Depending on the system, they may have standing to appear in court.

In post-conflict Kosovo, there was initially no formal system of legal aid in criminal cases. If a person appeared before the court, the court could appoint an attorney from one of the private lawyers who were part of the Chamber of Advocates, but per-

sons in detention had no means of seeking representation from a lawyer unless they knew of a lawyer and could pay for his or her services. When the United Nations Mission in Kosovo (UNMIK) was established, a list system was set up and a roster of attorneys posted at police stations so that arrested or detained persons could contact an attorney before they appeared in court. UNMIK later created a Criminal Defense Resource Centre to provide defense lawyers with research and technical assistance, especially with regard to making arguments based upon international human rights standards and to defending clients charged with war crimes, crimes against humanity, and genocide.

In determining how to implement and make effective the right to free legal assistance in a post-conflict state, national-level planning is crucial. The decision on which mechanism to introduce should not be undertaken without first consulting with lawyers and the judiciary as well as with the public, non-governmental organizations, civil society groups, and other interest groups. The level of funding required to establish, operate, and maintain adequate and competent legal aid systems should be carefully considered, as should the number and qualifications of the personnel required. Whatever legal aid mechanism is established, adequate training of personnel is vital. Where a defense unit or a list system of legal aid is established, a code of conduct for those providing legal aid must be developed.

Where the defense unit or the list system is introduced, a post-conflict state must consider the competence of the lawyers it engages. International human rights law requires that the lawyer represent the arrested or accused person *effectively* at all critical stages of criminal proceedings. (See *Artico v. Italy* [1980], 3 European Human Rights Report [EHRR] 1, paragraph 33, which observes, with particular regard to right to counsel, that the European Convention on Human Rights “is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective,” and ruling that an accused who was deprived of benefit of appointed lawyer’s services did not receive assistance guaranteed by article 6[3][c] of the convention.) Principle 6 of the United Nations Basic Principles on the Role of Lawyers requires that a lawyer providing free legal assistance to an indigent arrested person or accused person “must be a lawyer of sufficient experience and competence commensurate with the nature of the offense to them in order to provide effective legal assistance.”

A post-conflict state with a dearth of qualified lawyers may want to consider amending its law to allow for representation by foreign lawyers, who could supplement the local pool of lawyers. In post-conflict East Timor, the Solomon Islands, and Cambodia, provision was made to allow foreign lawyers to act as defense lawyers. However, in other post-conflict locales, such as Liberia and Kosovo, the use of foreign lawyers was vehemently opposed. It goes without saying that any foreign lawyer working in a post-conflict state needs to be fully competent in the types of cases he or she will handle and fully knowledgeable about the applicable law.

Part 3: The Police

General Commentary

In some states, the police are wholly responsible for the investigation of an alleged criminal offense and the storage of evidence. Once the police investigation is over, the police hand over all evidence and the file to the prosecution service. The prosecution service then decides whether or not there is strong enough evidence to mount a prosecution. If there is enough evidence, the prosecution service is responsible for bringing the case before the court. In other states, the police play a still crucial but less independent role in criminal investigation. The police may act under the direction of either a prosecutor or an investigating judge who is responsible for the creation of the case file and storage of evidence. Under the MCCP, the police act under the direction of the prosecutor in the case.

As part of the Model Codes project, a Model Police Powers Act has been created; it is contained in volume III of the *Model Codes for Post-Conflict Criminal Justice*. Many police acts contain a mixture of administrative and organizational provisions (e.g., provisions concerning the organizational structure of the police force, promotion, holidays, storage of weapons, and wearing of uniforms) in addition to setting out police powers and duties. The Model Police Powers Act, however, does not contain any administrative or organizational provisions. Instead, it deals solely with police powers and duties. It first covers the broad duties and powers of the police with regard to the maintenance of public order and criminal investigation, and then presents detailed provisions on the execution of police powers with regard to public order. The execution of police powers relating to criminal investigation is contained not in the Model Police Powers Act but in the MCCP. Part 3 of Chapter 3 of the MCCP elaborates more fully on the broad criminal investigation duties and powers of the police set out in the Model Police Powers Act. These powers are also elaborated upon in other parts of the MCCP. For example, the power to search premises and seize items is addressed in Articles 118–121; the power to question suspects in Chapter 8, Part 3, Section 1; the power to conduct a search of a suspect in Articles 122–125; and the power to conduct a physical examination of a suspect in certain defined instances in Article 142.

Article 53: Duties and Powers of the Police Relating to Criminal Investigation

1. The police are under a duty to investigate criminal offenses and must take all measures without delay to:
 - (a) prevent the concealment or loss of evidence;

- (b) locate the perpetrator of a suspected criminal offense;
 - (c) prevent the perpetrator or any accomplice from hiding or fleeing;
 - (d) detect and preserve traces or other evidence of a suspected criminal offense and objects that might be used as evidence; and
 - (e) collect all information that may be of use in criminal proceedings.
2. The police are also under a duty to make a written record or official note of:
 - (a) all actions taken in the investigation of a suspected criminal offense;
 - (b) facts and circumstances that are pertinent to the investigation; and
 - (c) all evidence or objects that have been gathered or found in the course of the investigation.
 3. In order to perform the duties set out in Paragraph 1, the police have the powers set out in the M CCP, the Model Police Powers Act and under the applicable law.

Commentary

Paragraphs 1 and 2: The Model Police Powers Act (MPPA) sets out the general duties of the policing authority including the duty of the policing authority to prevent, detect, and investigate criminal offenses. Paragraph 1 above elaborates upon the specific duties inherent in the broad duty outlined in the MPPA. In addition, Paragraph 2 requires that policing officials make an official note or written record of all actions taken in the investigation of a criminal offense and of any evidence gathered. This is especially important given the prosecutorial structure contained in the M CCP, whereby the prosecutor, directing the police, relies on the police to carry out the investigation and gather evidence. Once recorded, the details regarding the investigation or the evidence must be handed to the prosecutor to be put in the case file or, in the case of evidence, to be stored by the prosecutor.

Chapter 4: Rights of the Suspect and the Accused

Part 1: General Fair Trial Rights

Article 54: Right to Equality before the Law and the Courts

1. All persons are equal before the law.
2. All persons are equal before the courts.

Commentary

Paragraph 1: The guarantee contained in Paragraph 1 derives from a number of international and regional human rights treaties. It is expressed in Article 26 of the International Covenant on Civil and Political Rights, Article 24 of the American Convention on Human Rights, Article 3 of the African Charter on Human and Peoples' Rights, and Article 11 of the Arab Charter on Human Rights. Equality before the law relates to the equal treatment of persons in the application and enforcement of the law. It applies to all public officials, including judges, prosecutors, and policing officials, and requires that they treat all persons equally. Equality of treatment, however, does not mean identical treatment for all persons. Instead, it means that persons in a like position should be treated in the same way. The right to equality before the law is also related to the right to freedom from discrimination under Article 55.

A related but different concept to equality before the law is the right to equal protection of the law, a right which is also contained in Article 26 of the International Covenant on Civil and Political Rights, Article 3 of the African Charter on Human and Peoples' Rights, and Article 24 of the American Convention on Human Rights. Equal protection of the law relates to lawmaking and requires that all persons be treated equally in domestic laws.

Paragraph 2: The right to equality before the courts is a subset of the general right to equality and comes from Article 14(1) of the International Covenant on Civil and Political Rights, Article 5(a) of the International Convention on the Elimination of All

Forms of Racial Discrimination, and Article 15(2) of the Convention on the Elimination of Discrimination against Women.

Article 55: Right to Freedom from Discrimination

No person may be discriminated against on grounds such as sex, race, color, language, religion or belief, political or other opinion, sexual orientation, national, ethnic or social origin, wealth, birth, or other status.

Commentary

The right to freedom from discrimination applies more broadly than just in the context of the criminal justice system; however, in this context, it refers to freedom from discrimination both in the criminal law and in the operation of criminal justice. The right to nondiscrimination is found in the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 26), the American Convention on Human Rights (Articles 1[1] and 24), the Arab Charter on Human Rights (Article 3), and the Universal Islamic Declaration of Human Rights (Article III). There are also two treaties dedicated to the treatment of non-discrimination: the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of Discrimination against Women. The United Nations Human Rights Committee in General Comment no. 18 on Non-Discrimination has termed the right to nondiscrimination “a basic and general principle relating to the protection of human rights” (paragraph 1). Article 55 of the MCCP requires that discriminatory distinctions not be made between different people based on the grounds listed. To gain some idea of what “discrimination” means, it is useful to look to the definition of “racial discrimination” contained in Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination, which states that racial discrimination means “any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.”

This is not to say that distinctions between persons cannot be made. Distinctions between different persons are in fact permissible, even on the basis of the groups listed. The United Nations Human Rights Committee has stated that the determinant of whether a distinction is discriminatory is whether it is “reasonable and objective” and whether its aim is to achieve a purpose that is legitimate under the covenant (see General Comment no. 18, paragraph 13). The European Court of Human Rights has added

to this that there must be a “reasonable relationship of proportionality” between the different treatment and the aim pursued (see Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in *Belgium v. Belgium*, application no. 1474/62;1677/62;1691/62 [1967], ECHR 1 [February 9, 1967], paragraph 10).

Many of the grounds of discrimination listed in Article 55 are self-explanatory. The “other status” ground has been interpreted by the United Nations Human Rights Committee to include discrimination based on nationality, marital status, place of residence within a state, a distinction between foster children and natural children, and differences between students at public and private schools (see Sarah Joseph, Jenny Schultz, Melissa Castan, and Ivan Shearer, *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials*, p. 690).

Article 56: Presumption of Innocence

All persons are presumed innocent until proven guilty in accordance with the applicable law.

Commentary

The presumption of innocence is contained in international and regional instruments such as the Universal Declaration of Human Rights (Article 11), the International Covenant on Civil and Political Rights (Article 14[2]), the American Declaration of the Rights and Duties of Man (Article XXVI), the American Convention on Human Rights (Article 8[2]), the African Charter on Human and Peoples’ Rights (Article 7[b]), and the Arab Charter on Human Rights (Article 16). It is also found in the United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 84[2]). Guilt cannot be presumed before the prosecution proves a charge beyond reasonable doubt, and this principle applies until the judgment is made final as defined in Article 266 of the M CCP. There are a number of ways in which the presumption of innocence can be protected. First, according to the United Nations Human Rights Committee, the presumption is breached where public officials prejudge the outcome of a trial (General Comment no. 13, paragraph 7). Public officials include judges, prosecutors, the police, and government officials, all of whom must avoid making public statements of the guilt of an individual prior to a conviction or after an acquittal. It is permissible, however, for the authorities to inform the public of the name of a suspect and that the person has been arrested or has made a confession, as long as the person is not publicly declared guilty (see the European Court of Human Rights case of *Worm v. Austria*, application no. 83/1996/702/894 [August 29, 1997], paragraph 52). A second element in protecting the presumption of innocence relates to the burden of proof. The burden of proof refers to which party will have the burden of proving a particular fact or set of facts. In order to protect the presumption of innocence, the burden of

proof should be on the prosecution to prove the guilt of the accused rather than on the accused to prove his or her innocence. This principle is enshrined in Article 216 of the MCCC.

A third way in which the presumption of innocence can be maintained relates to how the suspect or accused person is presented. A suspect or accused person should not be made to look like a guilty person by being caged or shackled in the courtroom or forced to appear in court wearing a prison uniform or with his or her head shaved. If possible, the accused should be allowed to dress in civilian clothes for the duration of the trial. The presumption of innocence will not be violated where the accused person needs to be handcuffed or restrained to prevent his or her escape or to maintain the general security of the courtroom.

In addition to these guarantees, it is important that prior convictions of the accused not be disclosed to the court in the course of the trial, a disclosure that might unduly influence the decision of the judge and consequently violate the presumption of innocence. (Prior convictions may be considered, however, at a hearing on penalties conducted once an accused person has been found guilty of a criminal offense.) A person's right to the presumption of innocence may be violated not only leading up to and during a trial but also, if the person has been acquitted, afterward. Where a person has been acquitted, it is important for public officials not to make any statements suggesting that the person should have been found guilty.

The presumption of innocence is linked to many other fair trial rights; for example, the presumption of liberty found in Article 169 of the MCCC stems from the presumption of innocence, as does the right to trial without undue delay and the right of a detained person to trial within a reasonable time or release found in Article 63, and the freedom from self-incrimination laid out in Article 57. The right to a trial by an impartial judge as set out in Article 17 overlaps with the presumption of innocence.

Article 57: Privilege against Self-Incrimination and the Right to Silence

1. No person may be compelled to testify against himself or herself or to confess guilt.
2. No negative inferences may be derived from a person's failure to testify against himself or herself or to confess guilt.

Commentary

Paragraph 1: The right not to be compelled to testify against oneself and the right not to confess guilt are expressed in Article 14(3)(g) of the International Covenant on Civil and Political Rights, Articles 8(2)(g) and 8(3) of the American Convention on Human Rights, and Principle 21 of the Body of Principles for the Protection of All

Persons under Any Form of Detention or Imprisonment. While these rights are not expressly provided for in the European Convention on Human Rights and Fundamental Freedoms, the European Court for the Protection of Human Rights and Fundamental Freedoms has declared that the right not to be compelled to testify against oneself and the right not to confess guilt are implicit in the right to a fair trial set out in Article 6(1) of the convention.

The right not to be compelled to testify against oneself and the right not to confess guilt include two elements: the right to freedom from self-incrimination and the right to silence. These components are related and at times overlapping, but they are distinct. The right to silence encompasses only oral representations made by a person and refers to a person's right not to make oral statements to the police or any other criminal justice actor during the investigation of a criminal offense. The freedom from self-incrimination is broader in scope and refers to both oral representations and to the provision of any materials that may tend to incriminate a person. Under international human rights law, what is excluded from the freedom from self-incrimination are materials that are legally obtained from the accused under compulsory powers of criminal investigation such as breath, blood, and urine samples and bodily tissue for the purpose of DNA testing.

The right to silence is recognized as absolute in many states. In addition, under the international human rights conventions, there is no limitation placed on these rights. In some domestic jurisdictions, statutory provisions have been included to the effect that a person has the right to silence and the freedom from self-incrimination, but if the person does not provide information to the authorities or at trial, then adverse inferences may be drawn from the failure to provide information. The case law on such limitations on the right to silence and freedom from self-incrimination, mainly deriving from the European Court of Human Rights, is somewhat unclear. Under cases such as *Funke v. France* (application no. 10828/84, Judgment [February 25, 1993], paragraph 44), the European Court has stated that the freedom from self-incrimination is absolute. In the case of *Saunders v. United Kingdom* (application no. 19187, Judgment [December 17, 1996], paragraph 71), the court stated that self-incrimination was an absolute right and even applied where the compulsion to testify resulted in the giving of exculpatory evidence. On the other hand, in the case of *Murray v. United Kingdom*, the European Court—dealing with both the right to freedom from self-incrimination and the right to silence—deemed that a law that drew adverse inferences from an accused person's silence did not violate the European Convention because the inferences were not decisive to the finding of criminal responsibility. The drafters of the MCCP were firmly of the view that the right to silence and the freedom from self-incrimination should be recognized as absolute and unqualified rights under the MCCP. Part of the rationale for this view is the fact that where a person's right to silence is compromised, allowing adverse inferences means that the silence of a person is taken as an admission of guilt and thus the person's right to the presumption of innocence is violated.

As well as being related to the presumption of innocence, the right to silence and the freedom from self-incrimination are also related to the right to freedom from coercion, torture, or cruel, inhuman, or degrading treatment contained in Article 58, because the right to freedom from self-incrimination and the right to silence prohibit the use of these techniques to compel testimony.

As part of the right to silence and the freedom from self-incrimination, a suspect or an accused must be informed of these rights, as stipulated in Article 172(3)(a).

Article 58: Right to Freedom from Coercion, Duress, Threat, Torture, or Cruel, Inhuman, or Degrading Treatment

1. All persons have the right to be free from any form of coercion, duress, or threat of duress.
2. All persons have the right to be free from torture, threat of torture, or any other form of cruel, inhuman, or degrading treatment or punishment.

Commentary

The right to freedom from coercion, duress, or threat is related to the right to freedom from self-incrimination and the right to silence set out in Articles 57 of the M CCP, Article 14(3)(g) of the International Covenant on Civil and Political Rights, Articles 8(2)(g) and 8(3) of the American Convention on Human Rights, and Principle 21 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. According to the United Nations Human Rights Committee in General Comment no. 13, as part of the right to freedom from self-incrimination and the right to silence, any methods of compulsion are wholly unacceptable (paragraph 14). In addressing a number of cases brought before it, the United Nations Human Rights Committee has stated that the freedom from compulsion to testify or to confess guilt “must be understood in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused with a view to obtaining a confession of guilt” (*Kelly v. Jamaica*, communication no. 253/1987, Judgment [April 8, 1991], UN document CCPR/C/4/D/253/1987, paragraph 5.5).

The right to freedom from torture or cruel, inhuman, or degrading treatment stems from a number of international instruments, including the Universal Declaration of Human Rights (Article 5), the International Covenant on Civil and Political Rights (Article 7), the American Convention on Human Rights (Article 5), the African Charter on Human and Peoples’ Rights (Article 5), and the Convention on the Rights of the Child (Article 37). Unlike other rights, such as the right to privacy or the right to freedom of expression, the right to freedom from torture or cruel, inhuman, or degrading treatment is an absolute right. This means that under no circumstances can a person’s right to freedom from torture be violated. According to the United Nations Human Rights Committee, the prohibition of torture “allows of no limitation” (General Comment no. 20, paragraph 3). In 1984 a convention was drafted and signed specifically on this subject: the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The meaning of torture is spelled out in Article 1 of the convention: (1) the infliction of “severe pain or suffering” (discussed below), (2) for a number of purposes listed in the convention (discussed

below), (3) at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. The issue of what constitutes torture or “cruel, inhuman, or degrading treatment” has been the subject of debate. Some commentators view torture as an aggravated form of cruel, inhuman, or degrading treatment, while other bodies, such as the United Nations Human Rights Committee, view them as synonymous.

Torture or cruel, inhuman, or degrading treatment may be either physical or mental. Many people wrongly believe that such treatment involves only physical acts. The United Nations Human Rights Committee has stated that torture and cruel treatment “relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim” (General Comment no. 20, paragraph 5). Article 2 of the Inter-American Convention to Prevent and Punish Torture elaborates on this, stating that “torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.” There is no definitive list of what constitutes torture or cruel, inhuman, or degrading treatment; this will need to be decided on a case by case basis. Some guidance has been given by international and regional human rights bodies; for example, prolonged solitary confinement has been held to amount to torture and ill-treatment (see United Nations Human Rights Committee, General Comment no. 20, paragraph 6), as does the use of physical pressure during interrogation, hooding a person (placing a black hood over a detainee’s head), subjection to loud noise, sleep deprivation and deprivation of food, wall-standing (forcing detainees to stand with their legs spread against a wall for long periods of time), death threats, violent shaking, and using cold air to chill a person. Further guidance may be obtained by making reference to the jurisprudence of the United Nations Human Rights Committee, the European Court of Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the African Commission and Court on Human Rights, and the European Committee against Torture and to the work of the United Nations Special Rapporteur on Torture. With regard to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), reference may be made to *The CPT Standards: “Substantive” Sections of the CPT’s General Reports*, which outlines numerous acts that the committee considers to amount to torture or cruel, inhuman, or degrading treatment in the context of criminal proceedings. Also useful are *Combating Torture: A Manual for Judges and Prosecutors*, produced by the Human Rights Centre of the University of Essex and the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the “Istanbul Protocol”). Articles 229 and 232 of the MCCP require that all evidence obtained through torture or cruel, inhuman, or degrading treatment should be excluded from evidence by the court.

Article 59: Right to an Interpreter

A suspect or an accused has the right to the free assistance of an interpreter if he or she cannot understand or speak the language used in court.

Commentary

Interpretation is the oral conversion of information from one language to another. It is related but different from translation, which involves converting a written document from one language into another. The right to an interpreter is guaranteed by Article 14(3)(f) of the International Covenant on Civil and Political Rights, Article 6(3)(e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(a) of the American Convention on Human Rights. While the right to interpretation is mentioned in international human rights instruments, the right to translation is provided for only in the American Convention on Human Rights. In practice, however, the right to translation has been found to be inherent in the right to an interpreter.

The right to an interpreter should be available at all stages of criminal proceedings. Article 172(3)(i) requires that when a person is arrested, he or she is entitled to an interpreter and to such translations as are necessary to meet the requirement of fairness. According to General Comment no. 13 of the United Nations Human Rights Committee, the right to an interpreter should be available to all people who do not speak or understand the language of the court, including nationals and nonnationals (paragraph 13). International human rights law does not require that a person who understands or speaks the language of the court be provided with an interpreter where he or she would prefer to speak another language, for example, his or her native language (see comments of United Nations Human Rights Committee in *Bihan v. France* [communication 221/1987, UN document CCPR/C/41/D/221/1987 at 43 (1991)] and *Barzhig v. France* [communication 327/1988, UN document CCPR/C/41/D/327/1988 at 92 (1991)]), nor does it provide for the right to speak one's own language in court. Therefore, where a person meets the requirement of being able to speak or understand the language being spoken in the course of the criminal proceedings, he or she will not be provided with an interpreter.

The right to interpretation is related to the right to defend oneself personally or through counsel under Article 65 and the right to prepare a defense under Article 61. According to the United Nations Human Rights Committee in General Comment no. 13, the right to an interpreter is “of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defense (paragraph 13).”

Article 60: Right to Be Informed of the Charges

An accused has the right to be informed promptly and in detail in a language in which he or she understands of the nature and cause of the charge against him or her.

Commentary

The right to be informed in detail of the charges against a person is derived from Article 14(3)(a) of the International Covenant on Civil and Political Rights, Article 6(3)(a) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(b) of the American Convention on Human Rights. This right applies to accused persons as defined in Article 1(1) rather than to suspects as defined in Article 1(43). A suspect has the right in accordance with Article 172(2)(a) to be informed at the time of arrest of the reasons for his or her arrest and the right to be informed of any charges against him or her. Once a suspect becomes an accused person by reason of the confirmation of an indictment by the court or when a suspect is charged and is proceeded against by way of expedited trial, the extent of the information required by the accused person is greater. The accused person and his or her defense counsel will wish to prepare an adequate defense and, in accordance with Article 61, will require the facilities to do so. Part of the right to facilities to prepare a defense contained in Article 61 is access to information that the defense can use to defend the accused person. Thus, the right to be informed of the charges and the right to the preparation of a defense are interlinked.

According to General Comment no. 13 of the United Nations Human Rights Committee in interpreting Article 14(3)(a) of the International Covenant on Civil and Political Rights (the wording of which is duplicated in Article 60), the information given to the accused person must provide the law (i.e., the “nature”) and the alleged facts (i.e., the “cause”) upon which the charge is based (paragraph 8). The United Nations Human Rights Committee in its General Comment goes on to explain that *promptly*, in the context of Article 14(3)(a) of the International Covenant on Civil and Political Rights means “as soon as the charge is first made by a competent authority” (paragraph 8).

In order for an accused person to enjoy the right contained in Article 63, disclosure of information is required on the part of the prosecutor. Reference should be made to Articles 195 and 196, which require that the indictment filed against the suspect be transmitted to the suspect (the indictment contains information on both the legal and factual claims made by the prosecutor against the suspect). Reference should also be made to Chapter 10, Part 3, which outlines the disclosure regime and the various obligations on the prosecution to disclose relevant evidence to the accused person prior to the trial.

Article 61: Right to Preparation of a Defense

An accused has the right to adequate time and facilities for the preparation of his or her defense.

Commentary

The right to adequate time and facilities for the preparation of the accused's defense is contained in Article 14(3)(b) of the International Covenant on Civil and Political Rights, Article 8(2)(c) of the American Convention on Human Rights, and Article 6(3)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is a fundamental aspect of the principle of "equality of arms," discussed in the commentary to Article 62 of the MCCP. According to General Comment no. 13 of the United Nations Human Rights Committee, "what is 'adequate time' depends on the circumstances of each case" (paragraph 9). It will also largely depend on the complexity of the case. As to the concept of facilities, the United Nations Human Rights Committee in General Comment no. 13 stated that "facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel" (paragraph 9). Thus, the right to prepare a defense is related to the right to communicate with counsel set out in Article 70. The right to the preparation of a defense is also related to the disclosure regime established under the MCCP because this is the mechanism by which the prosecution must give the accused and his or her counsel relevant information to prepare the accused's defense. Reference should be made to Chapter 10, Part 3, which provides the obligations on the prosecution to disclose the indictment and other evidence to the defense pending a confirmation hearing, and Chapter 10, Part 4, which sets out the pretrial disclosure regime applicable under the MCCP.

Where the defense believes that it has been granted insufficient time to prepare a defense, it may make a motion to the court under Article 203(4) for an adjournment.

Article 62: Right to a Fair and Public Hearing and the Right to Be Present during a Trial

1. All persons are entitled to a fair and public hearing.
2. The press and the public may be excluded from all or part of a trial for any of the following reasons:
 - (a) to protect morals, public order, or national security;
 - (b) where the interests of a child so requires;
 - (c) where the protection of the private lives of the parties to the proceedings or witnesses so requires, such as in cases of sexual offenses; or
 - (d) in special circumstances, and only to the extent necessary, where publicity would prejudice the interests of justice.
3. Court judgments must be made public, except where the interests of a juvenile requires otherwise.
4. An accused person has the right to be tried in his or her presence, except as otherwise provided for in the MCCP.

Commentary

Paragraph 1: The right to a fair and public hearing is set out in a number of international and regional human rights instruments, including the Universal Declaration of Human Rights (Article 10), the International Covenant on Civil and Political Rights (Article 14[1]), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6[1]). The concepts of a “fair hearing” and a “public hearing” will be addressed separately.

The concept of a fair hearing is a general principle that applies to the whole criminal process. It is possible for a trial to provide all the other enumerated fair trial rights set out in international human rights law and yet not constitute a fair trial if it, as a whole, does not comply with the precept of fairness. These enumerated rights are only minimum guarantees. The right to a fair trial has therefore been construed as having a residual meaning that includes other indefinable characteristics that are necessary for the fair administration of justice. According to the United Nations Human Rights Committee’s interpretation, the right to a fair trial is broader than the sum of the individual fair trial guarantees and depends on the entire conduct of the trial (General Comment no. 13, paragraph 5). Similar sentiments have been expressed by the Inter-American Court of Human Rights (*Exceptions to the Exhaustion of Domestic Remedies*,

Annual Report of the Inter-American Court [August 10, 1990], OAS/ser. L/V/III.23, doc. 12, rev. 1991, page 44, paragraph 24). Implicit in the right to a fair trial is the concept of the “equality of arms.” According to the European Court of Human Rights, “[e]quality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a procedurally equal position during the course of the trial, and are in an equal position to make their case” (*Ofrer and Hopfinger*, applications nos. 524/59 and 617/59, *Yearbook* 6, December 12, 1960, pages 680 and 696). Violations of the equality of arms principle have been found by the European Court of Human Rights where, for example, one side was denied access to relevant documents contained in the case file, where a court considered submissions from only one party, and where one party was never informed about relevant dates in proceedings.

With regard to the required public nature of hearings, the United Nations Human Rights Committee has held that “apart from such exceptional circumstances [set out in Article 14(1) of the International Covenant on Civil and Political Rights], the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons” (General Comment no. 13, paragraph 6). A number of limited exceptions are set out in Paragraph 2 of Article 62. The rationale behind public hearings is, firstly, to ensure that the general public has an opportunity to see justice being done, and secondly, to ensure that trials are open to public scrutiny and attention, thus protecting the rights of the accused. In order to facilitate the operation of this right, it is important that a court make information about the time and venue of the oral hearings available to the public and provide adequate facilities, within reasonable limits, for the attendance of interested members of the public (*Van Meurs v. The Netherlands* [Communication no. 215/1986], UN document no. CCPR/C/39/D/215/1986 1990, paragraph 6.2). It is also important that the hearing of the trial be conducted orally at the trial court level (*Fredin v. Sweden* [No. 2], 18928/91 [1994], ECHR 5, [February 23, 1999]). This does not always apply to the appeals court level (*Fredin v. Sweden* 6–7), but leading commentators have suggested that hearings at the appeals court level should be public when they relate to the determination of a criminal charge.

Paragraph 2: Paragraph 2 provides a finite number of exceptions to the right to a public hearing. These exceptions have been drawn from Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the first place, it must be noted that Paragraph 2 refers to “the press” and “the public” as separate groups. In some instances, both groups may be excluded at the same time: however, in other instances, the court may determine that the press should be allowed to remain when the public is excluded.

The concept of “morals” in Subparagraph (a) is taken to include cases involving sexual offenses, while “public order” has been interpreted by some commentators as relating to order in the courtroom, and “national security” as relating to the protection of important military facts or to the protection of judges against attack. Amnesty International’s *Fair Trials Manual* points out in relation to the concept of national security that “international law does not grant to states an unfettered discretion to define for

themselves what constitutes an issue of national security. According to experts in international law, national security, and human rights, ‘A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the threat or use of force, whether from an external source, such as a military threat, or an internal source, such as incitement to overthrow the government’” (*Fair Trials Manual*, Section 14.3).

Subparagraph (b) refers to the “interests of a child.” This exception would be particularly relevant in cases of sexual offenses. The European Commission found that the exclusion of the public from a case involving sexual offenses against children was permissible under Article 6(1) of the European Convention (*X v. Austria* [1913/63], 2 Digest of Strasbourg Case Law 438 [April 30, 1965]), unpublished). Reference should be made to Article 335(2).

The final exception to the right to a public trial, enumerated in Subparagraph (d), is an exceptional measure. The determinant of whether the press or public can be excluded is that of “the interests of justice.”

Paragraph 3: The requirement that judgments be publicly delivered is set out in Article 14(1) of the International Covenant on Civil and Political Rights and in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The European Court of Human Rights has stated that the purpose of delivering the judgment in public is to “ensure the scrutiny of the judiciary by the public with a view to safeguarding the right to a fair trial” (*Pretto v. Italy*, application no. 7984/77 [1983] ECHR 15 ser. A, no. 71 [December 8, 1983], paragraph 27). The grounds for exclusion of the press and public under Paragraph 2 do not apply to the delivery of a judgment. The only permissible exception is where “the interests of a child require otherwise.” See Article 355(5).

There is a distinction between a judgment being pronounced publicly and being made public. The requirement set out in Paragraph 3 does not mean that a judge has to read the judgment verbatim in the courtroom. Instead, this right has been interpreted as meaning that the judgment must be publicly accessible to everyone.

Paragraph 4: The right to be present during a trial is expressed in the International Covenant on Civil and Political Rights (Article 14(3)[d]). The right to the presence of the accused is not expressly provided for by the European Convention on the Protection of Human Rights and Fundamental Freedoms, although this right has been interpreted as being implicit in Article 6 of the convention. The right is also not expressed in the American Convention on Human Rights; however, it has been also held to be implicit in Article 8 of the convention. Conducting a trial “in absentia,” or without the presence of the accused, is, according to the United Nations Human Rights Committee, permissible only “exceptionally for justified reasons” (General Comment no. 13, paragraph 11). Where a trial is conducted in absentia, according to the Human Rights Committee, “strict observance of the rights of the defense is all the more necessary.” However, in the case of *Mbenge v. Zaire* (UN document CCPR/C/OP/2[1990], paragraph 14.1), the Human Rights Committee further stated that the requirements of a fair trial laid down in the International Covenant on Civil and Political Rights “cannot

be construed as invariably rendering proceedings *in absentia* inadmissible irrespective of the reasons for the accused person's absence." Reasons justifying the accused person's absence may be that the accused, after being adequately informed of the date and time of the trial, has fled or that the accused has been disruptive and has been temporarily removed from the courtroom. These restrictions are contained in Article 214. Another exception and a temporary restriction on the presence of the accused during the trial is where a witness is testifying under a protective measure under Article 147(F) that requires the absence of the accused during his or her testimony. This may occur, for example, where the witness would be too intimidated to testify in the presence of the accused.

Article 63: Right to Trial without Undue Delay and the Right of Detained Persons to Trial within a Reasonable Time or Release

1. All persons have the right to trial without undue delay.
2. All detained persons have the right to trial within a reasonable time or release.

Commentary

Article 63 covers two aspects of international human rights law relating to the time when an accused person is tried. The right contained in Paragraph 1 applies to all persons, but the right contained in Paragraph 2 applies to detained persons only, as defined in Article 1(12).

Paragraph 1: The right to trial without undue delay is found in numerous international and regional human rights instruments: for example, the International Covenant on Civil and Political Rights (Article 14[3][c]), the American Convention on Human Rights (Article 8[1]), the African Charter on Human and Peoples' Rights (Article 7[1][d]), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6[1]). The terminology used in Article 63 mirrors that of the International Covenant on Civil and Political Rights.

The right to a trial without undue delay refers not only to the right to a trial but also to a final judgment without undue delay. According to the United Nations Human Rights Committee, the right to trial without undue delay "relates not only to the time by which a trial should commence, but also the time by which it should end and judgment is rendered; all stages must take place 'without undue delay'" (General Comment

no. 13, paragraph 10). The clock starts to run once a person is charged with a criminal offense, which has been interpreted by the European Court of Human Rights to mean “from an official notification given to an individual by the competent authority of an allegation that he has committed a criminal offense or from some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect” (*Kangaslauma v. Finland*, application no. 48339/99 [2004], ECHR 29 [January 20, 2004], paragraph 26). This may include the official initiation of an investigation (such as under Article 94 of the MCCC), an arrest (under Articles 170 or 171 of the MCCC), the questioning of a person by police (see *Kangaslauma v. Finland*, paragraph 26), or a search (see *Diamantides v. Greece*, application no. 60821/00 [2003], ECHR 533 [October 2003], paragraph 21). The clock stops and the right to a trial without undue delay is realized where there has been a final conviction or acquittal. Not only must the judgment be final but also the accused must be made aware of it.

There is no objective standard or benchmark when it comes to determining when a case has been conducted in violation of the accused’s right to trial without undue delay. This determination will depend on the individual facts and circumstances of the particular case. In one case, five years could be found to be a reasonable time, whereas in another case, one year could be found to be unreasonable. A number of factors are generally considered in the determination of what represents undue delay, for example, the conduct of the accused, the complexity of the case, and the conduct of the authorities. The ordinary delay in similar matters is also considered (see *König v. Federal Republic of Germany*, application no. 6732/73 [1978] ECHR [June 28, 1978] paragraph 99).

With regard to the conduct of the accused, it is not necessary that the accused cooperates in a manner to expedite the trial process or renounce some of his or her rights, such as the right to silence. He or she is entitled to assert all his or her procedural rights. In some instances, however, such as where the accused repeatedly asks for postponement of hearings, this behavior may be taken into account. With regard to the complexity of the case, the general rule is that the more complex a case is, the more time will be permitted to conduct the trial. A case may be deemed complex because of the nature and seriousness of the alleged offense. For example, an economic crime case that has been perpetrated transnationally will be much more complex than a simple robbery case and will require more time to investigate and try. A number of other things may be taken into account in looking at the complexity of the case, including the number of witnesses, the number of charges, and the number of coaccused or other people involved in the trial. The conduct of the authorities is often the primary factor in determining whether there has been undue delay in trying a case. A finding of undue delay may occur where a prosecutor has not been actively investigating a case or has not proceeded diligently in the investigation, or where there have been unnecessary delays in investigating the case. The delay can be found at the trial stage or even the appeals stage, in addition to the investigation stage. At the trial phase, a delay due to ineffective organization of the trial may also constitute a violation of the right to trial without undue delay (see *Yağci and Sargin v. Turkey*, application no. 16419/90; 16426/90 [1995], ECHR 20 [June 8, 1995], paragraphs 68–69). In a case before the United Nations Human Rights Committee, a violation was found where there was a twenty-nine-month delay in producing transcripts, which meant that an appeal took three years.

It should also be noted that the right to trial without undue delay may conflict with the right to adequate time and facilities to prepare a defense. Cross-reference should be made to Article 61 and its accompanying commentary.

In some post-conflict contexts, significant delays frequently occur in bringing accused persons to trial. Often, for example, accused persons are kept in detention for longer than the applicable law allows or in some cases beyond maximum penalty provided for the offense with which they are charged. Such protracted detentions can occur because of a proliferation of crime problems in the post-conflict period, or because the criminal justice system is overstretched and understaffed. In addition, programs to vet criminal justice personnel and remove those who may have been complicit in human rights violations may create a temporary shortage of personnel. The vetting process can also impair the authorities' ability to investigate and try criminal cases expeditiously. Undue delays of trial is not only a problem in itself but also creates other problems. For example, keeping accused persons in detention for excessive periods can lead to prison overcrowding.

Paragraph 2: The right to be tried within a reasonable time or otherwise to be released is contained in Article 9(3) of the International Covenant on Civil and Political Rights, Article XXV of the American Declaration on the Rights and Duties of Man, Article 7(5) of the American Convention on Human Rights, Article 5(3) of the European Convention on Human Rights, and Principle 38 of the Body of Principles for the Treatment of Persons under Any Form of Detention or Imprisonment. Under Paragraph 2, where a person is not tried within a reasonable time, he or she must be released from detention pending trial. The reasonableness of the time spent in detention pending trial is determined in the same way as the determination of undue delay discussed in the commentary to Paragraph 1. Articles 189 and 190 of the MCCP set out upper limits on the length of pretrial detention in an attempt to ensure that the trial takes place within a reasonable time and that the reasonableness of the time a person spends in detention is independently assessed by a judge.

Article 64: Right to Examination of Witnesses

The accused has the right to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same condition as witnesses against him or her.

Commentary

The right of the accused to examine or have examined witnesses on his or her behalf is expressed in Article 14(3)(e) of the International Covenant on Civil and Political Rights, Article 6(3)(d) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(f) of the American Convention on Human Rights. The right to examine witnesses—an inherent element of the “equality of arms” principle discussed in the commentary to Article 62—is, according to the United Nations Human Rights Committee, “designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witness as are available to the prosecution” (General Comment no. 13, paragraph 12). The right to examine witnesses is also related to the right to prepare a defense under Article 61.

The right to examine witnesses has two components: first, the right to call witnesses to testify during the trial, and second, the right to examine prosecution witnesses. The right to call witnesses is not unlimited in nature. For example, if a witness becomes unavailable or fails to appear, this is not a violation of the right to examine witnesses. In addition, a court is not required to call all witnesses requested by the defense. However, the court must not violate the principles of fairness and equality of arms. With regard to the right to examine prosecution witnesses, the defense must be given adequate opportunity to cross-examine the witness in court. Reference should be made to Article 224, which sets out the requirement that the defense may examine any witness called in court. An aspect of the right to examine a witness is that the defense has sufficient information about the witness to challenge his or her reliability (and to perhaps impeach the witness under Article 261). A number of cases raised before the European Court of Human Rights have dealt with the issue of anonymous witnesses and whether their use violated the right to examine a witness. These cases are discussed in the commentary to Chapter 8, Part 4, Section 2. Ultimately, the European Court held that the rights of the accused were not violated, after balancing the right to examine a witness against the need to protect the safety of persons testifying before the court and the safety of their families.

Part 2: Rights Relating to Legal Assistance to the Suspect and the Accused

General Commentary

There are several elements of the right to legal assistance, a number of which (e.g., the right to defend oneself in person, the right to choose one's own counsel, and the right to receive free legal assistance) are contained in Part 2. Reference should also be made to Article 52, which places an obligation on the state to establish a mechanism for delivering free legal assistance to indigent arrested persons and accused. The remaining right relating to the right to defense is contained in Article 172(3)(b)—the right to be informed of the right to counsel.

Article 65: Right to Defend Oneself Personally or through Counsel

1. A suspect or an accused has the right to defend himself or herself in person or through counsel.
2. A suspect or an accused has the right to have counsel present at all stages of the criminal proceedings, including during interrogation and during pretrial proceedings.

Commentary

Paragraph 1: The right to defend oneself in person or through legal assistance derives from Article 11(1) of the Universal Declaration of Human Rights, Article 14(3)(d) of the International Covenant on Civil and Political Rights, Article 8(2)(d) of the American Convention on Human Rights, Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7(1)(c) of the African Charter on Human and Peoples' Rights, and Principle 1 of the United Nations Basic Principles on the Role of Lawyers.

Paragraph 2: Where a person is being defended through counsel (either at his or her own expense or by way of free legal assistance), the M CCP provides that the person may be defended by counsel throughout the entirety of the criminal proceedings and not just during trial. This right is recognized in the Basic Principles on the Role of Lawyers (Principle 1) and in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 17). According to Amnesty International's *Fair Trials Manual* (chapter 3.1.1.), "A person's right to the help of a lawyer in pre-trial proceedings is not expressly set out in the ICCPR, the American Convention, the African Charter or the European Convention. However, the Human Rights Committee, the Inter-American Commission and the European Court have all recognized that the right to a fair trial requires access to a lawyer during detention, interrogation and preliminary investigations." The European Court of Human Rights, for example, found in the case of *Murray v. United Kingdom* ([1996] 22 EHRR 29) that a failure to grant an arrested person access to counsel within the first forty-eight hours after arrest was a violation of Article 6 of the European Convention on Human Rights and Fundamental Freedoms.

In the course of drafting the Model Codes, the drafters and other experts engaged in considerable discussion on the issue of access to counsel. The issue has also been debated among practitioners in post-conflict states. In a number of post-conflict states, some experts have supported the idea of restricting an arrested person's access to defense counsel, granting police or prosecutors access to an arrested person without the presence of a lawyer for some period immediately after arrest. Those who support such restrictions argue that they are justified because some defense lawyers, especially those retained by members of organized crime gangs, are in league with the gangs and would pass on information from an arrested person to other members of the gang, thereby, for example, helping to thwart the arrest of suspects not yet located. Opponents of the restrictions contend that denying the arrested person immediate access to counsel endangers his or her rights, increasing the risk, for example, that the suspect may be tortured or mistreated in some other way.

This latter school of thought won out in the debate among the drafters of the M CCP, which stipulates that the right to counsel without restriction is the general principle and should be followed in all but very exceptional cases. Rather than restricting access to counsel, police and prosecution should use supplemental safeguards to deter defense malfeasance. If it is proven that defense counsel is acting contrary to his or her professional standards of ethical conduct, or indeed contrary to the law (if he or she is involved in the obstruction of justice, for example, through leaking information to criminal associates who then take steps to thwart an investigation), he or she should be subject to disciplinary action or to prosecution for obstruction of justice (for such an offense, see Article 193 of the MCC). There are more appropriate ways of dealing with defense council misconduct than impinging upon a suspect's or accused's right to counsel.

Article 66: Right to Choice of Counsel

A suspect or an accused has the right to counsel of his or her own choosing.

Commentary

The suspect's or accused's right to counsel of his or her choosing derives from international instruments such as the International Covenant on Civil and Political Rights (Article 14[3][d]), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6[3][c]), the American Convention on Human Rights (Article 8[2][d]), and the African Charter on Human and Peoples' Rights (Article 7[1][c]). This right technically falls under the category of rights of the accused rather than rights of the suspect; however, it has consistently been held in case law to apply in the pretrial stages to a suspect. This right is also found in Principle 1 of the United Nations Basic Principles on the Role of Lawyers, which states that the purpose of having a lawyer of choice "is to protect and establish the rights of the suspect or accused to defend them in all stages of criminal proceedings." This means that the suspect or the accused can hire a qualified lawyer of their choice to represent him or her throughout the proceedings. Amnesty International's *Fair Trials Manual*, citing two cases from the United Nations Human Rights Committee, states that there have only been two exceptions made to this right. The first exception was made where the accused's lawyer was suspected of complicity in some of the criminal offenses charged; the second was made when the accused's lawyer refused to wear robes in court where required under the law (see section 20.3.2). The right to choice of counsel does not apply without restriction where a person has obtained free legal assistance under Article 67 or mandatory legal assistance under Article 68. In general, the state must endeavor to ensure that the suspect or the accused is amenable to the lawyer chosen to represent him or her. Principle H(d) of the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa provides a person with the right to contest the choice of his or her court-appointed lawyer. While the suspect or accused may contest the choice of counsel, there is no obligation on the state to provide another lawyer of choice as a substitute. The state must also ensure that the lawyer chosen is competent. The requirement that the lawyer chosen to provide free legal assistance to an indigent person be competent is discussed in the commentary to Article 52.

It is permissible for a person to engage the services of more than one lawyer in his or her defense. Where a person has chosen a lawyer who is also defending another accused in the same case, an issue may arise relating to conflict of interest. In many states, the court may limit the right to choice of counsel where such a conflict arises. Where this choice is not limited, best practice generally requires that the judge queries the suspect or the accused to determine if this is a fully informed and voluntary choice. Conflict of interest is usually dealt with in a code of practice or code of conduct for lawyers, which may require that a lawyer defend only one accused person in any criminal case.

Article 67: Right to Free Legal Assistance

Legal assistance without cost must be provided to an arrested person or an accused where:

- (a) the interests of justice so require; and
- (b) the arrested person or the accused does not have sufficient means to pay for legal assistance.

Commentary

The right to free legal assistance derives from Article 14(3)(d) of the International Covenant on Civil and Political Rights, Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 8(2)(e) of the American Convention on Human Rights. It is also contained in Principle H(a) of the African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle 17(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 93 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The right to free legal assistance becomes effective under the MCCC the moment a person is arrested (see Article 158[3][b]). Strictly speaking, this is a right that applies to the trial; however, it has consistently been held by international and regional human rights bodies and courts to apply to pretrial proceedings as well.

Under the American Convention, there is an “inalienable” right to free legal assistance where the person does not have the means to pay for it. This is qualified slightly in the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, which add the additional criteria of “the interests of justice.” In determining the meaning of the interests of justice, the United Nations Draft Declaration on the Right to a Fair Trial and a Remedy, at paragraph 50(a), states that “[t]he interests of justice in a particular case should be determined by consideration of the seriousness of the offense of which the defendant is accused and the severity of the sentence which he or she risks.” Identical wording is also used in the Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (Principle H[b][i]). The European Court of Human Rights in interpreting the same phrase has gone further in its consideration of relevant factors for the appointment of legal representation. In addition to examining the seriousness of the offense and the severity of the sentence (see *Quaranta v. Switzerland*, application no. 12744/87 [1991] ECHR 33 [May 24, 1991]), the European Court has also required the court to take into account the complexity of the case before it (see *Quaranta v. Switzerland*; and *Granger v. United Kingdom*, application no. 11932/86 [1990] ECHR 6 [March 28, 1990] ser. A, vol. 174 [1990]) and also the capacity of the arrested or accused to represent himself or herself (see *Pakelli v. Germany*, application no. 8398178 [1983] ECHR 6

[April 25, 1983], ser. A, vol. 64 [1983]). Ultimately, the test articulated by the European Court (*Artico v. Italy*, application no. 6694/74 [1980] ECHR 4 [May 13, 1980]) is whether “it appears plausible in the particular circumstances” that counsel would be of assistance (paragraph 35).

As discussed in the commentary to Article 66 above, the suspect or the accused who has been granted free legal assistance has a limited right to object to the choice of counsel. The state must ensure that counsel provided is competent. Principle 6 of the United Nations Basic Principles on the Role of Lawyers speaks of the need for the state to provide “a lawyer of experience and competence commensurate with the nature of the offense assigned to them.” The African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa contains more extensive guidelines and provides that the appointed lawyer should be “qualified to represent and defend the accused,” “have the necessary training and experience corresponding to the nature and seriousness of the matter,” “be free to exercise his or her professional judgment in a professional manner free of influence of the State or the judicial body,” “advocate in favour of the accused,” and “be sufficiently compensated to provide an incentive to accord the accused . . . adequate and effective representation.” Reference should be made to Article 52 on “Defense Service” for a more complete discussion on the provision of free legal assistance and its practical implementation around the world, including a discussion on free legal assistance in post-conflict environments, which usually have a dearth of lawyers available to take on cases.

Article 68: Mandatory Free Legal Assistance

1. An arrested person or an accused must have counsel when he or she is:
 - (a) a juvenile;
 - (b) mute or deaf, or where he or she displays signs of mental illness or other mental disabilities;
 - (c) charged with a criminal offense that carries a potential penalty of fifteen or more years’ imprisonment; or
 - (d) the subject of a request for extradition under Article 313.
2. If an arrested person or an accused who falls into categories set out in paragraph 1(a)–(d) does not engage his or her counsel, counsel must automatically be provided free of charge.

Commentary

Under Article 67, the right to free legal assistance is premised on two criteria: first, that the arrested person is indigent, meaning he or she does not have the means to pay for legal assistance; and second, that the “interests of justice” require the provision of free legal assistance. In some cases, free legal assistance should be provided as an automatic right. This is standard practice in many states around the world, particularly with regard to vulnerable groups such as children or those with mental disabilities. It is also standard practice in many states to afford mandatory defense to those who have committed serious offenses. The M CCP under Article 68 provides that persons who have committed serious offenses, meaning offenses that carry a potential penalty of fifteen years’ or more imprisonment, must have an automatic right to free legal assistance, as does a person subject to a request for extradition, given the complicated nature of extradition proceedings.

Article 69: Waiver of Right to Counsel

1. The right to counsel may be waived by an arrested person or an accused, except where he or she:
 - (a) is a juvenile; or
 - (b) displays signs of mental illness or other mental disabilities.
2. Before a person waives his or her right to counsel, the implications of waiving the right to counsel must be explained to the arrested person or accused.
3. A waiver of the right to free legal assistance under Article 69 may only be made in the presence of a lawyer.
4. A waiver of the right to counsel by an arrested person or an accused must be:
 - (a) voluntarily made;
 - (b) in writing;
 - (c) contain a declaration that the implications of waiving the right to free legal assistance or to counsel have been explained to the arrested person or the accused and that the person understands the consequences of waiving his or her right;
 - (d) signed by the arrested person or the accused; and
 - (e) signed by the police officer or prosecutor to whom the waiver is made.

5. Where the facilities exist, the waiver must be audio or video recorded.
6. Waiver of the right to counsel by an arrested person or an accused does not preclude the subsequent reassertion of that right by the arrested person or the accused.

Commentary

The right to counsel “belongs” to the arrested or accused person; consequently, in general, he or she also has the right not to exercise that right. A waiver of the right to counsel is given a revocable status under Paragraph 4, meaning that the person may reassert their right at any time and the prior waiver will be deemed prospectively void. Due to the potential danger that an arrested person or an accused person may be coerced or forced into waiving their right to counsel, Paragraph 2 provides that the waiver must be given in writing and must contain a declaration that the person understands fully the implications of waiving this right.

Article 70: Right to Communication with Counsel

1. A suspect or an accused has the right to communicate freely and confidentially, orally and in writing, with his or her counsel.
2. This right must be respected at all stages of the proceedings.
3. Communications between a detained suspect or accused person and his or her counsel may be within sight but not within hearing of a police officer or detention authority officer.

Commentary

Article 70 is inspired by Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7(1)(c) of the African Charter on Human and Peoples’ Rights, Principles 8 and 22 of the United Nations Basic Principles on the Role of Lawyers, Principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and Rule 93 of the United Nations Standard Minimum Rules for the Treatment of Prisoners. The United Nations Human Rights Committee has noted that access to counsel is important for the protection of a detainee (General Comment no. 20, paragraph 11). It has also noted that communication with counsel should take place in conditions that give full respect

to the confidentiality of the communications and that “lawyers should be able to counsel and represent their clients in accordance with their established professional standards and judgment without any restrictions, pressures or undue influences from any quarter” (General Comment no. 13, paragraph 9).

The general right to communicate freely and confidentially with counsel is given effect in Paragraph 3, which requires that when a person is consulting with counsel a police officer or detention authority officer must not be able to hear what is being said. The police officer or detention authority officer may have a view of the consultation for security reasons, however. In addition, there must be no surveillance or recording devices activated in the area where the confidential lawyer-client communication is taking place, nor can the suspect or the accused be asked subsequently by a police officer or detention authority official to disclose what went on during the consultation.

The right to communicate with counsel from the time the person is arrested and the right to inform counsel of the arrest are also contained in Article 172.

Article 71: Right to Presence of Counsel during Interviews

A suspect or an accused has the right to the presence of his or her counsel during all interviews with the police or the prosecutor, if counsel has been retained or appointed.

Commentary

Under international human rights law, it is unclear if the right to have contact or communication with counsel (as set out in Article 71) extends to the interview of a suspect or an accused by the police or the prosecutor. There is no defined right to have counsel present during interviews under international human rights law. That said, many commentators believe that it does in fact apply to the interviews of suspects and is part of the overall right to a fair trial contained in international human rights law and set out in Article 62. As discussed in the commentary to Article 62, the right to a fair trial comprises more than the sum of the rights set out in international human rights law and may include other rights, such as the right to presence of counsel during interviews, that are not contained in the various provisions set out in conventions or treaties on the subject. Moreover, many states around the world have long integrated the presence of counsel during interviews into their criminal procedure law. The presence of counsel during interviews not only facilitates the right of the suspect or the accused to defend himself or herself (as set out in Article 65) but also helps to protect the accused’s right to freedom from coercion, duress, threat, torture or cruel, inhuman, or degrading treatment (as set out in Article 58). The European Committee for the Pre-

vention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), in support of the presence of counsel during interviews, has stated that “access to a lawyer for persons in police custody should include the right to contact and be visited by the lawyer (in both cases under conditions guaranteeing the confidentiality of their discussions) as well as, in principle, the right for the person concerned to have the lawyer present during interrogation” (*Second General Report*, CPT/Inf [1992], page 3, paragraph 38). For the foregoing reasons, the drafters of the Model Codes were of the view that the presence of counsel during interviews was a best practice standard and therefore should be integrated into the MCCP.

Chapter 5: Victims in Criminal Proceedings

General Commentary

The involvement of victims in criminal proceedings and the rights or interests afforded to victims vary from state to state. In some legal systems, the role of victims is limited to testifying in court as a witness and making a victim impact statement relevant to the determination of a suitable penalty for a convicted person. The victim has no right to bring evidence before the court, for example. In contrast, in some states, victims play a very active role in proceedings. Specific rights allow the victim to join the criminal proceedings as another party, sometimes known as a “private prosecutor.” A private prosecutor may be present in court, represented by legal counsel. He or she may question witnesses and may bring evidence before the court. In some legal systems, a victim may become a private prosecutor only in tandem with a state-led prosecution. In other legal systems, a victim may initiate a private prosecution irrespective of state action. Other legal systems provide for a range of rights and interests that should be afforded to a victim, for example, the right to be informed of the progress of the case and the right to bring evidence before the court.

The MCCP takes a compromise position between legal systems that provide for no victim involvement in proceedings and those that provide for a high level of victim involvement. Under the MCCP, victims may request the prosecution service to undertake an investigation (Article 73), victims must be updated on the progress of the case (Article 74), and victims may access evidence (Article 77) and must be notified of any hearing dates, trial dates, appeals dates, and so forth (Article 75). At the main trial, the victim may apply to the court to partake in the proceedings by making a statement, presenting evidence to the court, or examining a witness (Article 76). Unlike in many systems, the foregoing are not automatic rights but may be granted at the discretion of the court or the prosecution service, respectively.

Reference should be made to Article 1(45) and its accompanying commentary for the definition of *victim* and a discussion of the definition.

Under international human rights law, victims are not afforded legal rights per se. However, a number of nonbinding instruments and declarations set out principles relating to victims, including the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power that was adopted by the United Nations General Assembly in 1985, and the Council of Europe Recommendation No. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (1985). The MCCP incorporates many of these principles into the MCCP. Some of these principles are also contained elsewhere in this chapter. For example, Principle 6(d) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which requires that measures be taken to protect the pri-

vacy of victims and to ensure their safety and their families from intimidation and retaliation, is addressed in Chapter 8, Part 4, Section 1. Article 99 of the MCCC provides for the notification of victims on the decision of the prosecutor to initiate, suspend, or renew an investigation as set out in Principle 6(a) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. It further provides for an appeal against a decision of the prosecutor not to initiate or to discontinue an investigation under Article 100. The issue of victim restitution and compensation contained in Principles 8–13 is addressed in Article 62 of the MCC, which provides for compensation to the victim as an additional penalty that the court may impose upon a convicted person.

Article 72: General Provisions on Victims

1. Victims must be treated with compassion and respect for their dignity by police, prosecutors, and the courts.
2. The courts of [insert name of state], prosecutors, and the police must, at all stages of criminal proceedings, consider the needs of the victims, especially of children, elderly persons, mentally or physically ill persons, and victims of criminal offenses involving sexual or gender violence.
3. The status of a person as a victim is not related to whether the perpetrator of the criminal offense is identified, apprehended, prosecuted, or convicted, and is independent of any familial relationship with the perpetrator.

Commentary

Paragraph 1: This paragraph articulates the requirement of Principle 4 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. A similar requirement is contained in paragraph A(1) of the Council of Europe Recommendation no. R (85) 11 on the Position of the Victim in the Framework of Criminal Law and Procedure (1985), which provides that victims be treated “in a sympathetic, constructive and reassuring manner.”

Paragraph 2: In dealing with victims, criminal justice actors (the police, prosecution service, and the courts) must take into account the needs of victims. Paragraph 2 requires that criminal justice actors pay particular attention to the needs of especially vulnerable victims (the sick, children, the elderly, and victims of sexual or gender violence), who are often overlooked or not treated with due attention. The term *needs* is used here as it is employed in the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, in place of the term *rights*. Article 46

also places an obligation on the prosecutor to consider the needs of victims. Reference should be made to the commentary to Article 46.

Paragraph 3: Paragraph 3 is inspired by Principle 2 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

Article 73: Requests by a Victim to the Prosecutor to Undertake an Investigation

The prosecutor in a criminal case must take into consideration the request of a victim to undertake a specific investigation, collect certain evidence, or take specific measures. The prosecutor may accept or reject the request of the victim.

Commentary

Article 73 provides that a victim can make certain requests to the prosecutor with regard to a specific investigation. Although the prosecutor is not required to follow those requests (he or she is bound only by the applicable law and code of ethics), the prosecutor must give the requests due consideration. In implementing the requirement contained in Article 73, a post-conflict state should set up a mechanism and procedure that allow the victim to petition the prosecutor and to receive a response.

Article 74: Updating a Victim on the Progress of a Case

The prosecutor in a criminal case must take reasonable steps to keep the victim informed of the progress of the case.

Commentary

Principle 6(a) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims be informed of the progress of proceedings. In addition to Article 74, Article 110 on the questioning of victims, requires that the police or the prosecutor inform the victim of his or her right to be

notified and take the name and contact information of the victim to ensure that the prosecutor can contact the victim.

Article 75: Notification of a Victim of Criminal Proceedings

1. Where a victim indicates to the prosecutor in a case that he or she wishes to be notified of any proceedings in the case, the prosecutor must take reasonable steps to notify the victim in advance of the date, time, and place of:
 - (a) the initial detention hearing under Article 175;
 - (b) each continuation of a detention hearing under Article 188;
 - (c) the confirmation hearing under Article 201;
 - (d) the trial under Chapter 11;
 - (e) the conditional release hearing under Article 273; and
 - (f) any appeal under Chapter 12.
2. The notification may be delivered orally to the victim. Notification of a victim may be otherwise than in accordance with Article 27, provided that the notice is of a nature that is reasonable under the circumstances and likely to convey actual notice of the proceedings.
3. Defects in the notification of the victim do not deprive a court of jurisdiction to proceed in a case.

Commentary

Article 75 elaborates on the principle set out in Article 74 that the victim must be kept informed of the progress of the case. Principle 6(a) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims be informed not only of the progress of proceedings but also of the timing and the disposition of the case. The service requirements contained in Article 27 of the MCCP do not apply to the notification of victims. Instead, the prosecutor is required to make earnest efforts to contact the victim either in writing or orally (e.g., by telephone). Where there has been a defect in the victim notification process, Paragraph 3 provides that this will not interfere with the progress of the criminal case. Under Article 110 on the questioning of victims, the police or the prosecutor must inform the victim of his or her right to be notified of the date, time, and place of proceedings and must take the name and contact information of the victim in order to ensure that the prosecutor can contact the victim.

Article 76: Participation of a Victim in Criminal Proceedings

The competent court may, upon request of the victim, allow the victim to:

- (a) make a statement in the course of proceedings;
- (b) supply evidence in court proceedings; or
- (c) present questions to witnesses and expert witnesses, directly or through his or her counsel.

Commentary

Principle 6(b) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power provides that the needs of victims be facilitated by “allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings.” Article 76 gives effect to this need by providing the court with discretion, upon the request of the victim, to partake in proceedings (either a hearing or a trial).

Article 77: Access to Evidence

The competent court may, upon the request of the victim, allow the victim or his or her counsel to inspect, copy, or photograph records and physical evidence available to the court or to the prosecutor if the victim has a legitimate interest in doing so.

Commentary

Where a victim has been granted the right to participate in criminal proceedings, the court may need to grant the victim access to evidence to enable the victim to adequately prepare for the proceedings. The granting of access to evidence is solely at the discretion of the court. The court may refuse access to evidence where the victim has no legitimate interest in accessing it, and the court may refuse access in other cases, where, for example, allowing access to evidence would run counter to other provisions of the M CCP, such as those on witness protection (Articles 147–155) and on witness anonymity (Articles 156–162), or where granting access to evidence might endanger the criminal investigation or the lives or health of people.

Article 78: Counsel for a Victim in Criminal Proceedings

A victim whose request for participation in proceedings has been granted under Article 76 may be represented by counsel.

Commentary

Principle 6(c) of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power requires that victims be provided with proper assistance throughout the legal process. One interpretation of this requirement is that the victim should be given the opportunity to have legal assistance. A victim who is granted the opportunity to partake in court proceedings under Article 76 may be represented by counsel. There was some discussion among the drafters about whether a victim should be granted free legal assistance. Although this would be preferable, given the extreme lack of defense counsel in many post-conflict states and the typical resource constraints on a post-conflict criminal justice system, the drafters concluded that providing victims with legal assistance free of charge would be an unattainable goal in a post-conflict state or any state that is resource starved.

Article 79: Medical and Psychological Assistance for Victims

The competent legislative authority must endeavor to make arrangements for the provision of medical and psychological assistance to victims.

Commentary

Principles 14 and 15 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power require that victims “should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means” and that victims be informed of the availability of health and social services and other assistance and be afforded access to them. The *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* (1999) contains

extensive discussion on victim assistance, including victim assistance programs and the role and responsibility of frontline professionals to victims. In some states, and even in post-conflict Kosovo, victim assistance units have been established to provide direct services or to liaise with community organizations. Such units have been established in prosecutor's offices and police stations.

In a resource-starved post-conflict state, the state may not be able to provide both medical and psychological assistance to victims. In many states, post-conflict and non-post-conflict, victim assistance is provided by nonstate actors such as non-governmental organizations or other voluntary or community-based groups. It may be useful for the authorities in a post-conflict state to work with such organizations to implement the requirements contained in Article 79.

With regard to victims of domestic violence, a post-conflict state and non-governmental and civil society organizations need to consider the provision of safe shelter in cases where the victim cannot return to his or her home. This is outlined in the *Framework for Model Legislation on Domestic Violence* that was drafted by the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences and adopted by the United Nations Commission on Human Rights (UN document E/CN.4/1996/53/Add.2, paragraph 15[d]). The Framework document also outlines other emergency and nonemergency assistance that should be provided to victims of domestic violence (paragraphs 60 and 61).

Chapter 6: Criminal Proceedings against a Legal Person

General Commentary

Article 19 of the MCC establishes criminal responsibility over legal persons, or corporate criminal responsibility, a concept that is increasingly being recognized at both the international and the domestic levels. Under the terms of Article 19, a legal person may be prosecuted for any criminal offense set out in the MCC. Reference should be made to Article 19 and its accompanying commentary for a detailed discussion on the criminal liability of legal persons. Reference should also be made to Section 12, Subsection 4, of the MCC, which provides specific penalties for legal persons; these penalties are distinct in some respects from those applicable to natural persons.

Bringing a legal person before the court for the trial of a criminal offense has its own peculiarities in terms of the law of criminal procedure. Chapter 6 of the MCCP lays out a number of procedural rules that apply to proceedings against legal persons. The provisions of Chapter 6 have been drawn from domestic legislation on the liability of legal persons.

Article 80: Proceedings against a Legal Person

1. The prosecution of a legal person for a criminal offense, or offenses, may be undertaken even if the prosecution of a natural person for the same criminal offense or offenses has been undertaken or is concluded. The prosecution of a legal person may also take place where there has been no prosecution of a natural person for the criminal offense concerned.
2. Where a legal person and a natural person are being prosecuted for the same criminal offense or for different criminal offenses committed in the course of the same transaction, they may be jointly charged in one indictment under Article 193.

Commentary

Article 80 reiterates the principle set out in Article 19(3) of the MCC that the prosecution of a legal person may proceed independently of any prosecutions of a natural person with regard to the same criminal offense. No issues of double jeopardy, or *ne bis in idem*, contained in Article 8 of the MCC arise to block the prosecution or trial; that principle applies only to one person being prosecuted twice for the same offense.

For the sake of judicial and prosecutorial economy, where a legal person and a natural person are being prosecuted for the same criminal offense at the same time, both persons may be jointly charged in one indictment. Joinder of the accused persons is permissible under Article 193 of the M CCP, which concerns two natural persons who are charged with the same or different criminal offenses committed in the course of the same transaction. Article 80 expands that scope to allow for the joinder of a natural person and a legal person. Reference should be made to the commentary to Article 193 that discusses the concept of joinder, including the meaning of “committed in the course of the same transaction” that is used in Article 193.

Article 81: Representative for a Legal Person in Criminal Proceedings

1. Where a legal person is being prosecuted for a criminal offense or offenses, one representative of the legal person must be present at all proceedings.
2. A representative of a legal person is a person who is authorized to represent the legal person under the applicable law.
3. A person may not act as a representative of the legal person where:
 - (a) the person is a witness at the trial of the legal person; or
 - (b) the person has been prosecuted for the same criminal offense, unless he or she is the only representative of the legal person.
4. Where a person is not eligible to be a representative of the legal person under Paragraph 3, the competent trial court must request the competent body of the legal person to appoint another representative within a specified period and to notify the court of the appointment in writing. If this is not done within the specified period, the court may appoint a representative for the legal person.
5. The registry of the competent trial court must notify the [insert name of body responsible for registering legal persons in the state] that the legal person is subject to legal proceedings and cannot be dissolved during proceedings against the legal person.

Commentary

Because a legal person is incorporeal and therefore cannot appear in court to face prosecution, it is necessary for a representative of the legal person to appear in court. As stated in Paragraph 2, the representative is the person who is designated as such under the applicable law. The applicable law is the law of the state and includes company/corporate law that designates who the representatives of the legal person are. Paragraph 3 sets out the instances in which the representative may not act as a representative. In such a case, the court must require that the “competent body of the legal person”—most likely the board of directors of the company—appoint another representative and notify the court in writing. Where this is not done in the time specified by the court, a court-appointed legal representative must represent the legal person in court.

Paragraph 5: The penalties provided for in the MCC for legal persons (see Article 68), in part, target the assets of the legal person. If the legal person were to be dissolved (e.g., terminated or wound up) during the legal proceedings, the assets would not be available if the penalty involved use of the legal person’s assets (e.g., if the penalty was confiscation of assets under Article 68[d] or payment of compensation to a victim under Article 68[b]). Thus, the MCCP provides that no proceedings to dissolve the legal person may be brought during criminal proceedings. This provision would certainly need to be harmonized with the relevant provisions of the applicable law on legal persons.

Article 82: Defense Counsel for a Legal Person in Criminal Proceedings

1. A legal person may have defense counsel in addition to a representative of the legal person.
2. Where a legal person and a natural person are being tried for the same criminal offense or different criminal offenses committed in the course of the same transaction, the legal person and the natural person must not have the same defense counsel.

Article 83: Service of Documents and Other Court Materials on a Legal Person

1. Service of documents and other court materials, including summonses, orders, decisions, indictments, judgments, or items whose delivery is required under any provision of the MCCP, must be delivered to the address of the legal person.
2. Documents or other court materials served on the legal person under Paragraph 1 must also be served on the representative of the legal person in accordance with Article 27.

Article 84: Contents of the Indictment against a Legal Person

The indictment against a legal person must include, in addition to the information set out in Article 195(3), the following:

- (a) the name under which the legal person operates under the applicable law;
- (b) the seat of the legal person; and
- (c) the basis for the liability of the legal person under the MCC.

Article 85: Opening Statements at Trial

1. The representative of the legal person may make a statement at trial in accordance with Article 223.
2. The representative of the legal person must not be compelled to make solemn declaration and must not be examined about the content of the statement by the prosecutor or the trial court.
3. The trial court must decide on the probative value, if any, of the statement of the representative.

Commentary

Under Article 223 of the M CCP, the accused may make an unsworn opening statement to the court. Article 85 extends the scope of this provision to allow the representative of the legal person to make a similar statement.

Article 86: Written Judgment against a Legal Person

In addition to the requirements of Article 269, the written judgment against a legal person must contain:

- (a) the name under which the legal person operates under the applicable law;
- (b) the seat of the legal person; and
- (c) the basis for the liability of the legal person under the MCC.

Chapter 7: Provisions Relevant to All Stages of the Criminal Proceedings

Part 1: Proceedings on Admission of Criminal Responsibility

Article 87: Proceedings on Admission of Criminal Responsibility

1. A suspect or an accused may make an admission of criminal responsibility in relation to a criminal offense of which he or she is accused at any stage before the final decision at trial.
2. When a suspect or an accused makes an admission of criminal responsibility, the court in which the admission is made must do the following:
 - (a) ensure that the suspect or the accused understands the nature and consequences of making an admission of criminal responsibility;
 - (b) ensure that the admission of criminal responsibility has been made voluntarily;
 - (c) verify that the admission of criminal responsibility is supported by the facts of the case that are contained in:
 - (i) the charges as alleged in the indictment and admitted by the accused, if an indictment has been presented or confirmed;
 - (ii) any materials presented by the prosecutor that support the indictment and that the suspect or accused accepts; and
 - (iii) any other evidence, such as the testimony of witnesses, presented by the prosecutor or the suspect or the accused.
3. Where the court is satisfied that the conditions under Paragraph 2 are met, the court may consider the admission of criminal responsibility, together with any

additional evidence presented, as establishing all the essential facts that are required to prove the criminal offense to which the admission of criminal responsibility relates, and may declare that the suspect or the accused is criminally responsible for those offenses for which an admission has been made.

4. Where the court finds that any of the conditions set out in Paragraph 2 are not met, the court must consider the admission of criminal responsibility as not having been made and must order that the proceedings continue under the ordinary procedures provided for in the MCCP.
5. Where the court, despite being satisfied that the conditions under Paragraph 2 are met, considers that a more complete presentation of the facts of the case is required in the interests of justice, taking into account the interests of the victims, the court may:
 - (a) request the prosecutor to present additional evidence, including the testimony of witnesses; or
 - (b) order that the proceedings be continued, in which case it must consider the admission of criminal responsibility as not having been made.
6. Any agreements between the prosecutor and the suspect or accused regarding modification of the counts in the indictment, the admission of criminal responsibility, or the penalty to be imposed upon the suspect or the accused person are not binding upon the court.

Commentary

Article 87 allows for the entering of an admission of criminal responsibility prior to the final verdict at trial. This mechanism, often known as “entering a guilty plea,” is a common feature of some legal systems. It is viewed as a tool of efficiency. Due to the fact that an admission will preempt the need to try the case in full, implementation of this mechanism saves time and resources and ensures that the court system is not overburdened with cases. In many post-conflict states and territories, such as Kosovo, Bosnia and Herzegovina, and East Timor, that did not previously have such a mechanism, new legislation was introduced to make the admission of criminal responsibility a feature of their justice systems.

The suspect or the accused can make the admission before a judge at any time. Once an admission of criminal responsibility has been made, Article 87 provides a detailed procedure to be undertaken by the judge or judges. It is incumbent upon the judge or judges to assess whether the person making the admission understands the nature and consequences of entering an admission, whether such an admission is given voluntarily, and whether the facts support such a conclusion. When all three criteria are met, the judge may proceed to sentence the person (after hearing any additional evidence of the prosecution or the defense that relates to the issue of penalties), or, if the “interests of justice” so require, the judge may order the continuation of the

trial, notwithstanding the fact that a plea has been entered. Where the mechanism for the admission of criminal responsibility has been introduced into law by post-conflict states, there has been some criticism of the failure of judges to adhere to the stated procedure. It is imperative that a judge not immediately proceed to the determination of penalties upon the admission of criminal responsibility but that the judge look behind the admission to assess the volition of the person making the admission and his or her understanding of the mechanism and its effects.

Sometimes a prosecutor will enter into a plea agreement with the suspect or the accused, which means that the prosecutor will advise the court to impose a lesser penalty because of the admission of criminal responsibility. The court then can consider the advice of the prosecutor and make a determination of whether to follow that advice or not. An admission of criminal responsibility generally serves as a mitigating factor in favor of a lesser penalty. Article 51(1)(j) of the MCC provides that the entering of an admission of criminal responsibility under Article 87 of the M CCP be taken into consideration by the judge, even though the advice of the prosecutor to impose a lesser penalty upon the accused is not strictly binding upon the judge.

Part 2: Variation of Time Limits

Article 88: Variation of Time Limits

1. Upon the motion of the court, the prosecutor, or the defense, any time limits in the MCCP may be enlarged or reduced upon good cause being shown and after consideration of the interests of the prosecutor and the rights of the suspect or the accused.
2. Upon the motion of the prosecutor or the defense, the court may recognize as validly done any act done after the expiration of a time limit prescribed in the MCCP or in an order made by a competent judge. The determination must be made on terms that are just.
3. Paragraphs 1 and 2 do not apply to the time limits set out in Article 172(4) or any of the time limits set out in Chapter 9, Part 2, in addition to other time limits that if extended would unduly impact on the rights of the suspect or the accused.
4. The prosecutor or the suspect or the accused must file a motion for the variation of time limits with the registry of the competent trial court or appeals court.
5. The registry of the competent trial court or appeals court must forward the motion for variation of time limits to the competent judge.
6. Upon receipt of the motion for the variation of time limits, the competent judge must make a determination within a reasonable time about whether or not to make an order for the variation of time limits.
7. The competent judge must release a written and reasoned decision at the same time as the order for variation of time limits, if an order is granted. If an order for variation of time limits is not granted, the decision must be released within a reasonable time of the receipt of the motion for the variation of time limits.
8. The order for the variation of time limits, if granted, and the decision on the variation of time limits must be served upon the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27.

Commentary

Paragraph 6: The drafters of the MCCP did not specify a particular time limit within which the judge must determine the motion. Instead, the term “reasonable time” is used. Ideally, a decision will be made within a matter of days rather than months, but what is “reasonable” will depend upon the circumstances.

Part 3: Mental Incapacity of a Suspect or an Accused

Article 89: Mental Incapacity of a Suspect or an Accused

1. If an accused is deemed to be mentally incompetent after the commission of the criminal offense, the court must adjourn or terminate proceedings in accordance with Article 89.
2. A person may be declared mentally incompetent where he or she does not possess:
 - (a) a sufficient and present ability to consult with his or her defense counsel with a reasonable degree of rational understanding; or
 - (b) a rational and factual understanding of the proceedings against him or her.
3. The prosecutor and the defense may file a motion for a declaration of mental incompetence with the registry of the competent trial court at any time after the confirmation of the indictment under Article 201. The motion must be accompanied by a written statement setting out the facts upon which the motion relies.
4. Where a motion for a declaration of mental incompetence is filed by the prosecutor or by the defense, the court must order a psychiatric forensic evaluation of the person where there is a bona fide doubt about the mental competence of the suspect or the accused.
5. The court may also, on its own motion, make an order for a psychiatric forensic competency evaluation of the accused.
6. The psychiatric forensic competency evaluation must be conducted by a psychiatrist or a psychologist with experience in forensic psychiatry or forensic psychology.
7. A competency evaluation report must be submitted to the court.
8. Upon receiving the competency evaluation report, the competent judge or panel of judges must set a date and time for a competency hearing.

9. The competency evaluation report must be served on the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27, along with notification of the date and time of the competency hearing.
10. The court must consider whether the accused person is mentally incompetent as defined in Paragraph 2 in light of the competency evaluation report. The court is not bound to follow the findings of the competency evaluation report.
11. The standard of proof at the competency hearing is the balance of probabilities.
12. The prosecutor and the defense may make submissions at the competency hearing as to the competence or incompetence of the accused.
13. Where the court finds that the accused is mentally competent, the proceedings must continue.
14. Where the court finds that the accused is mentally incompetent, and where it is determined that there is no substantial likelihood of the person obtaining competency, the proceedings must be terminated. The order of the court to terminate proceedings must be stayed for ten days, during which time a civil committal hearing must be scheduled.
15. Where the court finds that the accused is mentally incompetent, and where it is determined that there is substantial likelihood of the person obtaining competency, the court must adjourn the proceedings and order treatment of the accused. Treatment should be administered in the least restrictive manner. Only accused persons deemed to be dangerous to themselves or to others may be committed to an institution for the care of mentally ill persons.
16. The competency of the accused must be reviewed at a competency hearing every ninety days.
17. The treatment provider or chief of the institution for the care of mentally ill persons must provide the court with a written report on the mental competency of the accused prior to the hearing. The report must be served upon the prosecutor, the suspect or the accused, and his or her counsel prior to the hearing in accordance with Article 27.
18. The prosecutor, the suspect or the accused, and his or her counsel must be notified of the time and date of the competency hearing, and notice must be served upon the parties in accordance with Article 27.
19. If the court determines at the competency hearing that the accused has recovered and is mentally competent, the order for adjournment of the proceedings must be terminated.

20. If the court determines at the competency hearing that the accused is still mentally incompetent as defined in Paragraph 2, the person will be remitted to treatment and the issue will be reviewed again in another ninety days.
21. An accused person who is deemed mentally incompetent but with a substantial likelihood of obtaining competency may, under Paragraph 17, remain under the court's jurisdiction for a reasonable period of time. If after a reasonable period of time, the accused person has not regained mental competency, the competent court must terminate proceedings. The order of the court to terminate proceedings must be stayed for ten days, during which time a civil committal hearing should be scheduled.

Commentary

Article 89 allows the court to suspend or terminate criminal proceedings against an accused person (meaning a person against whom an indictment has been confirmed under Article 201) where the person is found, upon evaluation, to be mentally incompetent. The issue of mental incompetence may be particularly relevant in post-conflict states where many members of the community may suffer traumatization due to the conflict and as a consequence may be suffering from mental illness.

Incompetency to stand trial must be distinguished from a plea of insanity as a defense under Article 23 of the MCC. Where a person pleads insanity, the plea relates to his or her mental competence to commit a criminal offense at the time of commission. In contrast, when a person pleads mental incompetency to stand trial, the court will look at the accused's mental competency in the present moment. A person may have been mentally competent at the time of the commission of the offense but may have subsequently become mentally incompetent. Where a person is deemed mentally incompetent, the standard practice around the world is to suspend the proceedings until the person recovers or to terminate the proceedings indefinitely where the person has no prospect of recovering. Where the trial is suspended or terminated, the person is generally placed under supervisory care.

The question of competency to stand trial might arise in the case of an accused person who is a juvenile (see the definition of juvenile contained in Article 1[26]). The same standards and processes for assessing the competency to stand trial of adults apply to juveniles. However, compared to adults, juveniles have a higher likelihood of mental disorders, developmental immaturity, and other characteristics that may predispose them to be incompetent to stand trial. Generally, juveniles are less competent decision makers than adults and may not understand the consequences of their actions, the charges against them, the role of their lawyer, or the trial proceedings. For this reason, judges and lawyers should exercise extra care to assess the competency of an accused juvenile to stand trial. As discussed in Article 326, the criminal justice system should emphasize the rehabilitation and reintegration of juveniles into society. In the case of accused juveniles found to be incompetent, treatment should emphasize rehabilitation and social reintegration, focusing on the juvenile as a patient with a mental disorder rather than attempting to restore the competency of the juvenile to stand trial.

Many post-conflict states have experienced difficulties in dealing with mentally incompetent accused persons. Unfortunately, these states often experience a high incidence of mental health problems but have very little medical capacity to address them. Often there are no fully functioning institutions or facilities for the care of mentally ill persons. In some post-conflict locales, mentally incompetent persons who enter the justice system have been put in prison simply because there were no other facilities in which to place them. Also, mentally ill persons have been tried for offenses while mentally incompetent and even have been convicted when the person was not of sound mind when the criminal offense was committed. In order to address the needs of mentally ill accused persons, criminal law must provide for the defense of insanity, as does Article 23 of the MCC. In addition, provisions such as Article 89 should be contained in the law to allow for the adjournment or termination of proceedings against mentally incompetent persons. Beyond this, the domestic laws on civil committal must be adequate and up to date, in line with best practice standards, and sufficient resources and facilities need to be provided for the treatment of mentally ill persons.

Paragraph 2: This paragraph defines what is meant by mental incompetence and provides the test that the court should adhere to in determining whether to suspend or terminate proceedings.

Paragraph 6: A psychiatric evaluation of an accused must be carried out by a forensic psychologist or psychiatrist, who must conduct an in-depth evaluation of the person's mental competency. Unfortunately in many post-conflict states, there is no forensic psychology capacity. In East Timor, for example, a number of cases arose in which accused persons were apparently mentally incompetent. The court experienced great difficulty in finding experts to evaluate their competency and had to rely on experts outside the country. For those conducting psychiatric evaluations, reference may be made to the Specialty Guidelines for Forensic Psychologists that were developed by the Committee on Ethical Guidelines for Forensic Psychologists of the American Psychological Society.

Paragraphs 14 and 15: In a post-conflict state, not only is the criminal justice system likely to be in poor condition but so too is the health care system, including hospitals and facilities for the care of the mentally ill. Dealing with mentally ill accused persons is therefore challenging. Post-conflict reconstruction efforts often encompass the rebuilding of hospitals and other health care facilities. In order for Article 89 to operate effectively, adequate facilities to house persons who have been found to be mentally incompetent and a danger to themselves or others must exist. Mentally ill persons must not be placed in prisons in lieu of proper treatment facilities. If necessary, because of resource constraints, a separate wing may be set up in a prison to house mentally ill prisoners. In addition, proper treatment facilities with qualified personnel should be provided.

The term *stay* used in Paragraph 14 means that the execution of the order is suspended temporarily and will not begin to take effect until the expiration of the time limit set out in this Paragraph.

Paragraph 21: In ascertaining the appropriate period of time that a person deemed mentally incompetent but capable of recovery should spend under court jurisdiction, the drafters of the MCCC considered giving the court jurisdiction over the person until the expiration of the maximum penalty of imprisonment for the crime of which the person was accused. The drafters decided, however, that this was too harsh and that the court should instead retain jurisdiction over the person for a “reasonable period of time.” This standard is contained in many criminal procedure codes around the world. Courts have interpreted reasonability for the length of treatment differently. In no case should treatment exceed the maximum penalty that could have been imposed upon the person had he or she been convicted of the offense. In most cases, two years or less of treatment has been determined reasonable. The determination of reasonability should consider the restrictive nature of the treatment, the seriousness of the alleged offense, the likelihood that the accused committed the offense, and the probability of restoring competency in the foreseeable future.

Chapter 8: Investigation of a Criminal Offense

Part 1: Initiation, Suspension, and Discontinuation of a Criminal Investigation

General Commentary

Under the MCCP, the initiation, suspension, and discontinuation of a criminal investigation carry specific requirements to make them official. This is not the practice in every state around the world. In states that do require an official action, the requirements are often based on a more strict interpretation of the principle of legality, entailing that each stage has a specific legal meaning. To initiate, suspend, or discontinue an investigation, one requirement is the issuance of a written decision, on which a high premium is placed in many states. The drafters of the Model Codes concluded that, in the context of the MCCP, a similarly high premium should be placed on both the principle of legality and the requirement of written decisions as a means of ensuring that the actions taken in the course of the investigation will be properly recorded. In many post-conflict states, investigation records have not been properly maintained and files have been lost. Consequently, a suspect could sit in detention awaiting trial while the office of the prosecutor and the prison have little or no information about the suspect. This problem could lead to a gross impingement of the suspect's fundamental human rights, such as the right to trial without undue delay (Article 63), and inadvertently contribute to prison overcrowding, another feature of many post-conflict states. It is therefore imperative that significant attention be given to the issue of record keeping in the course of the criminal investigation. Obvious resource constraints—such as a lack of pens and paper, which is, unfortunately, all too common in post-conflict states—should be taken into account by national authorities and international assistance providers. Providing the basic resources to facilitate record keeping is vital in ensuring the efficient administration of justice and safeguarding the rights of the suspect or the accused.

Reference should be made to Figures 4 and 5 in the annex, which set out the procedure of criminal investigation in a diagrammatic format.

Article 90: Purpose of a Criminal Investigation

The purpose of a criminal investigation is to:

- (a) investigate information or reports that raise a suspicion that a criminal offense has been committed;
- (b) uncover, preserve, and collect evidence of criminal offenses;
- (c) establish, with regard to a specific criminal offense, if a suspect can be identified; and
- (d) determine whether sufficient reasons exist for the prosecution of a suspect of a criminal offense.

Article 91: Conduct of a Criminal Investigation

1. The criminal investigation is conducted by the prosecutor and by the police, under the direction and supervision of the prosecutor.
2. The prosecutor may issue his or her directions to the police orally, in writing, or by other technical means of communication.
3. The prosecutor may be present during all investigative actions carried out by the police.
4. The prosecutor may, of his or her own accord, undertake investigative measures, provided for under the MCCP or the applicable law, that are ordinarily undertaken by the police.
5. The police may undertake investigative measures without the prior direction of the prosecutor in urgent cases, as provided for in Article 93.
6. In the course of a criminal investigation, the police must:
 - (a) follow the directions of the prosecutor in carrying out actions and measures aimed at uncovering and apprehending the suspect and in collecting the evidence and other relevant information for criminal proceedings;

- (b) provide, without delay, to the prosecutor the following:
 - (i) notification of all investigative actions undertaken, whether undertaken as a matter of urgency under Article 93 or under the direction of the prosecutor, and the results of such actions;
 - (ii) a written report and supplementary information on the investigative action; and
 - (iii) notification of the reasons for the police's inability to undertake a specific action directed by the prosecutor, when such cases occur.
- 7. Information related to the initiation and conduct of an investigation and its findings is confidential and must not be accessible to third parties, except when otherwise provided for in the MCCP or the applicable law.

Commentary

Paragraph 1: In some states, the police are wholly responsible for the investigation of criminal offenses and the storage of evidence. Once the investigation is over, the police hand over all evidence and the case file to the office of the prosecutor. The office of the prosecutor then decides whether or not the evidence is strong enough to mount a prosecution. If there is enough evidence, the office of the prosecutor is responsible for bringing the case before the court. In other states, the police play a crucial, yet not-so-independent, role in the criminal investigation. The police may act under the direction of either a prosecutor or an investigating judge who is responsible for the creation of the case file and storage of evidence. Under the MCCP, the police act under the direction of the prosecutor.

Paragraph 2: In some legal systems, the prosecutor must issue orders in writing to the police and may issue orders orally only in urgent cases. The benefit of this system is that it provides a record, or “paper trail,” of both the investigation and the communication between the prosecutor and the police. The drafters of the MCCP provided for a more flexible system of communication, where the prosecutor can issue orders in writing, orally, or even by e-mail. To ensure that this system works, institutional cooperation between the office of the prosecutor and the police needs to be nurtured and mechanisms need to be set in place to facilitate interinstitutional cooperation. It may be necessary to draw up protocols, standard operating procedures, codes of conduct, or other agreements to build an effective institutional relationship such as is outlined in the MCCP. Providing details on how the general principles set out in the MCCP would operate in practice might also be required. An interagency steering committee may be helpful in navigating difficulties that arise on an ongoing basis. Building the relationship between the police and the prosecutor may take time, particularly in a state where the office of the prosecutor and the police have never worked together or the police have previously led investigations and, with the introduction of a new regime, must now act under the prosecutor's direction.

Article 92: Reporting of a Criminal Offense

1. Any person may report a criminal offense to the police or to the office of the prosecutor.
2. Public officials are obliged to report to the office of the prosecutor criminal offenses about which they have been informed or about which they learn in the exercise of their duties as public officials.
3. A person may report a criminal offense orally, in writing, or by any technical means of communication.
4. When a criminal offense is reported orally, a record of the reported facts must be made. The record must be read to the person who reported the criminal offense and, when possible, the reporting person must be given the opportunity to sign the record.
5. When a criminal offense is reported via technical means of communication or via written note, an official note must be made by the police or the office of the prosecutor.
6. Where a criminal offense is reported to a court or to an office of the prosecutor outside of the jurisdiction where the criminal offense was allegedly committed, the court or the office of the prosecutor must make an official note and forward the note immediately to the competent office of the prosecutor.
7. Where the police obtain information of a criminal offense, either through the reporting of a crime or through their own activities, they must, without delay and no later than twenty-four hours after obtaining such information, inform the prosecutor and thereafter provide the prosecutor with further reports and supplementary information.
8. Where the police arrest a person found in the act of committing a criminal offense or after pursuit immediately following the commission of a criminal offense, under Article 170 the police must immediately notify the prosecutor of the arrest.

Commentary

Not every criminal offense comes to the attention of the police through a formal, written crime report. The police may, for example, catch a suspect in the act of committing a criminal offense, or they may learn of the criminal offense from a member of the public. For those criminal offenses that are reported, Article 92 provides legal recognition of the reporting of a criminal offense as a first step in the criminal proceedings. Any person is free to report a crime directly to the police or to the prosecutor. This

report may be done in person, in writing (e.g., by letter), or by technical means (e.g., by e-mail). In some instances, the report will be made by a named person; in other cases, it may be anonymous. Paragraph 2 articulates the obligation of public officials to report criminal offenses that they become aware of during the course of their work as a public official. This duty pertains only to those criminal offenses that public officials witness or learn of while acting in an official capacity. This duty is usually found in a state's code of conduct for public officials.

In some states, the criminal procedure code requires citizens to report any criminal offense they witness as a matter of civic duty. Other states require that persons with children under their care (e.g., teachers and day-care workers) report any suspicions of physical or sexual abuse of a child. Neither of these duties is included in the M CCP. The consideration as to whether or not such duties should be included in domestic criminal law is a matter for the individual state and is a question of public policy that should be openly discussed, and decided upon as part of the reform process.

When the particular criminal offense reported to the police or the office of the prosecutor is domestic violence (contained in Article 105 of the MCC), the *Framework for Model Legislation on Domestic Violence*, drafted by the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences (UN document E/CN.4/1996/53/Add.2), provides specific guidance on the preparation of a domestic violence crime report (paragraphs 22–25). The framework document also contains useful guidance on the duties of police officers with regard to domestic violence (paragraphs 13–17) and the rights of victims of domestic violence (paragraph 21).

Article 93: Investigative Measures prior to the Formal Initiation of an Investigation

1. Where the prosecutor obtains reliable information that a criminal offense has been committed, either through the report of a crime under Article 92 or in some other way, he or she must direct the police to carry out the urgent necessary measures in accordance with the M CCP, the Model Police Powers Act (MPPA), and the applicable law to:
 - (a) identify and locate the suspect;
 - (b) prevent the suspect or any accomplice from hiding or fleeing;
 - (c) detect and preserve traces of the criminal offense and objects that may serve as evidence of the criminal offense; and
 - (d) gather information that may be of use for criminal proceedings.
2. Prior to informing the prosecutor about a reported criminal offense under Article 92(7) or Article 92(8), the police may, in urgent circumstances, undertake investigative measures without the direction of the prosecutor.

3. After reporting a criminal offense to the prosecutor, under Article 92(7) or Article 92(8), the police may, in urgent circumstances, undertake investigative measures without the direction of the prosecutor.
4. Where the police undertake investigative measures under Paragraph 2 or Paragraph 3, the measures must pursue the aims set out in Paragraph 1(a)–(d) and must be provided for in the MCCP, the MPPA, or the applicable law.
5. Where the police undertake investigative measures under Paragraph 2 or Paragraph 3, the police must immediately notify the prosecutor about such investigative measures.

Article 94: Initiation of an Investigation

1. The prosecutor may, having evaluated the information made available to him or her, initiate an investigation where a reasonable suspicion that a criminal offense has been committed exists.
2. The decision to initiate an investigation must be in writing and must state:
 - (a) the name of the prosecutor;
 - (b) the time and date on which the investigation was initiated;
 - (c) the criminal offense, or offenses, being investigated;
 - (d) the circumstances in which the information about the criminal offense was obtained, including the information provided by the reporting person, if applicable;
 - (e) a description of the circumstances and facts justifying the reasonable suspicion that a criminal offense has been committed; and
 - (f) a description of the evidence and information already collected by the police and the prosecutor.
3. Where an investigation focuses on a specific person or persons where probable cause exists that the person or persons committed the criminal offense under investigation, the written decision to initiate the investigation must contain the name or names of the person or persons being investigated and a description of the facts justifying the probable cause.
4. The prosecutor may, at any time, reconsider a decision to initiate an investigation, based on new facts or information.
5. The written decision of the prosecutor to initiate an investigation must be sent to the chief prosecutor.

Commentary

Article 94 provides for the formal initiation of a criminal investigation. It may be noted that under the M CCP, an investigation is opened into a criminal offense rather than against a specific person initially (even where the investigation may focus on a specific person during the early stages).

A formal initiation of a criminal investigation is not required under domestic criminal law in many states. In other states, an investigation requires an official “opening.” The drafters of the Model Codes thought it preferable to provide for such an official opening under the M CCP. This requirement adds to the overall aims of creating a documentary record and cataloging all the steps in the investigation stage.

Paragraph 1: Reference should be made to Article 1(40) for the definition of *reasonable suspicion*.

Paragraph 3: It may be noted that the standard of proof for the opening of an investigation into a criminal offense under Paragraph 1 is lesser than that for the opening of an investigation into a particular person for the commission of a criminal offense. Reference should be made to Article 1(36) for the definition of *probable cause*.

Article 95: Grounds Barring the Initiation of an Investigation

1. The prosecutor must not initiate an investigation into a criminal offense where:
 - (a) jurisdiction over the criminal offense cannot be asserted under Articles 4–6 of the MCC; or
 - (b) the investigation and prosecution of the criminal offense are barred by statutory limitations under Article 9 of the MCC.
2. Where an investigation focuses on a specific person or persons against whom probable cause exists that the person or persons committed a criminal offense, the prosecutor may not initiate an investigation where:
 - (a) jurisdiction over the person to be investigated cannot be asserted under Article 7 of the MCC;
 - (b) jurisdiction over the person to be investigated cannot be asserted because the person has been tried for the criminal offense and has been convicted or acquitted under Article 8 of the MCC; or
 - (c) the person to be investigated has died.

Commentary

Paragraph 1: Where a criminal offense is not within the jurisdiction of the court, meaning that the court does not possess territorial, extraterritorial, or universal jurisdiction over the criminal offense in question under Articles 4–6 of the MCC, the prosecutor must not initiate the investigation. In addition, when the prosecutor finds that the prosecution is barred by the statutory limitations contained in Article 9 of the MCC, an investigation cannot be initiated. Reference should be made to the commentaries to Articles 4–6 and Article 9 of the MCC for further discussion on jurisdiction and statutory limitations, respectively.

Paragraph 2: The initiation of an investigation into a criminal offense for which there is a likely suspect may be barred where the court does not have personal jurisdiction over the suspect under Article 7 of the MCC, where the *ne bis in idem* principle applies to that person, or where that person has died. For a discussion on the meaning and scope of personal jurisdiction and *ne bis in idem* (otherwise known as *double jeopardy*), reference should be made to Articles 7 and 8 of the MCC, respectively.

Article 96: Discretion of the Prosecutor to Decide Not to Initiate an Investigation

1. At the discretion of the prosecutor, he or she may decide not to initiate the investigation where:
 - (a) there is sufficient evidence that a criminal offense has been committed, but the evidence against a suspect is insufficient and there is no reasonable possibility of finding additional evidence; or
 - (b) there are substantial reasons to believe that an investigation would not serve the interests of justice.
2. The prosecutor must take into account the interests of the victims and the witnesses to the criminal offense in deciding not to initiate an investigation under Paragraph 1(b).
3. A decision not to initiate an investigation under Paragraphs 1(a) and 1(b) must be sent to the chief prosecutor and must be confirmed in writing by the chief prosecutor in order to be valid.

Commentary

Paragraph 1(b): This paragraph gives the prosecutor the power not to initiate a prosecution that not serve the “interests of justice.” This phrase is not defined in the M CCP, nor is a finite list of instances in which a case should not be continued articulated. Instead, the provision gives discretion to the prosecutor to determine when he or she should not initiate a case in the interests of justice. Some experts consulted during the Model Codes consultation process had concerns that such a ground would open the door to abuse in that a prosecutor could, for example, dismiss a case upon political grounds. This was not the intention of the drafters of the M CCP in including such a provision, because dismissing a case upon political grounds would be improper. Instead, Paragraph 1(b) provides a mechanism, which will only be used in rare and exceptional circumstances, to enable the prosecutor not to pursue cases where it would not be fair or just to do so. The prosecutor must balance the interests of the victim, the suspect, and society at large and use his or her discretion to determine if, based on any compelling interest or the totality of the circumstances, pursuit of the case would not result in justice. To this end, the prosecutor may consider factors such as the seriousness of the criminal offense and the extent of harm caused by it; the history, character, and condition of the suspect; the impact of the noninitiation of proceedings on the confidence of the public in the criminal justice system; the impact of the noninitiation of proceedings on the safety or welfare of the community; the victim’s opinion on the noninitiation of proceedings; and any exceptionally serious misconduct of the police in the investigation, arrest, or detention of the suspect.

Article 97: Suspension of an Investigation

1. During the investigation, the prosecutor may, having evaluated the information made available to him or her, suspend the investigation where:
 - (a) the suspect becomes mentally incapacitated after the commission of the criminal offense or is suffering from a serious disease;
 - (b) the suspect has evaded the administration of justice and cannot be located;
 - (c) other circumstances exist that temporarily prevent the successful prosecution of the suspect; or
 - (d) it is in the interest of justice to suspend the investigation.
2. The decision to suspend an investigation must be in writing and must state:
 - (a) the name of the prosecutor;
 - (b) the time and date on which the investigation was suspended;
 - (c) the particular criminal offense(s) being investigated;

- (d) where an investigation focuses on a specific person or persons under Article 94(3), the name of the person(s) being investigated; and
 - (e) the reasons justifying the suspension of the investigation.
- 3. Prior to the suspension of an investigation, all obtainable evidence regarding the criminal offense must be gathered and stored securely by the prosecutor.
- 4. The written decision of the prosecutor to suspend an investigation must be sent to the chief prosecutor.
- 5. A decision to suspend an investigation under Paragraphs 1(c) and 1(d) must be confirmed by the chief prosecutor in order to be valid.
- 6. The prosecutor must issue a decision to resume the investigation where the reasons underlying the suspension of the investigation cease to exist.
- 7. The decision to resume the investigation must be in writing and must state:
 - (a) the fact of the resumption of the investigation;
 - (b) the reasons for the resumption of the investigation; and
 - (c) the date of the resumption of the investigation.
- 8. The written decision of the prosecutor to resume an investigation must be sent to the chief prosecutor and must be confirmed by the chief prosecutor in order to be valid.

Commentary

Just as the initiation of an investigation requires a written decision on the part of the prosecutor, so does the official suspension of an investigation. Paragraph 1 sets out the grounds upon which the prosecutor may suspend an investigation. Where the suspect becomes temporarily mentally ill or contracts some other serious disease or where the suspect has evaded justice (meaning that he or she cannot be found by the authorities), these are valid grounds for suspension. As with the initiation of the investigation, the written decision must be sent to the chief prosecutor. Where the case is suspended based on Paragraph 1, the chief prosecutor must validate the suspension.

The prosecutor obviously cannot predict how long the suspension will last. The prosecutor will need to keep track of the suspect's mental state, serious illness, or any other issue that precluded the continuation of the investigation. Once these circumstances are no longer applicable, the investigation can be resumed. The resumption of an investigation must be officially declared by a written decision transmitted to the chief prosecutor who must confirm it in order for it to be valid.

Both the suspension and the resumption of an investigation have implications for the statutory limitation pertaining to the particular criminal offense or offenses. Reference should be made to Article 12 of the MCC and its accompanying commentary.

Paragraph 1(d): Reference should be made to the commentary to Article 96(1)(b).

Article 98: Discontinuation of an Investigation

1. At any time during the investigation, the prosecutor must discontinue the investigation of a criminal offense when he or she establishes, having evaluated all the information and evidence collected, that there is insufficient evidence that a criminal offense has been committed.
2. At any time during the investigation, the prosecutor must discontinue the investigation of a suspect when he or she learns that any of the reasons barring the initiation of investigation under Article 95(2) exist.
3. At any time during the investigation, the prosecutor may discontinue the investigation of a suspect under the grounds set out in Article 96(1).
4. The decision to discontinue an investigation must state:
 - (a) the name of the prosecutor;
 - (b) the time and date on which the investigation was discontinued;
 - (c) where an investigation focuses on a specific person or persons under Article 94(3), the name of the person being investigated; and
 - (d) the reasons justifying the discontinuation of the investigation.
5. The written decision of the prosecutor to discontinue an investigation must be sent to the chief prosecutor and must be confirmed by the chief prosecutor in order to be valid.
6. The prosecutor may, at any time, reconsider a decision to discontinue an investigation based on new facts or information and can, in accordance with Article 94, reinitiate an investigation.

Commentary

Once an investigation has been officially initiated, it must continue until an indictment is presented under Article 195 unless it is either suspended or officially discontinued. The discontinuation of an investigation, like initiation and suspension, requires a written decision of the prosecutor that must be submitted and confirmed by the chief prosecutor. The grounds for discontinuation outlined in Paragraph 2 are identical to the grounds for noninitiation of an investigation under Article 95(2). Where the prosecutor discovers that any of these circumstances are present, he or she must immediately discontinue the investigation. The prosecutor has discretion to discontinue the investigation under the grounds set out in Paragraph 4, which are identical to those found in Article 96(1).

Paragraph 3: Reference should be made to the commentary to Article 96(1)(b) for a discussion of the grounds for discontinuing an investigation. In some legal systems, a prosecutor may also have the power to discontinue a case once an indictment has been confirmed and even during a trial. This is done by way of motion before the court on the grounds that the case should be dismissed in the “interests of justice.” In some states, the judge has the power, on his or her own motion, to discontinue a case once the indictment has been confirmed. This sort of provision would come into play only in very rare cases. Such provisions have not been included in the MCCP, given the potential for their abuse in a post-conflict state, where the criminal justice system may be nascent or issues relating to corruption may exist within the legal system. Some experts consulted during the drafting of the MCCP were of the view that such a power could politicize the criminal justice system if a judge or prosecutor moves to dismiss a case on political grounds.

Article 99: Notification of a Victim on the Decision to Initiate, Suspend, or Discontinue an Investigation

1. The prosecutor must inform the victim of a criminal offense when the prosecutor has initiated, decided not to initiate, suspended, or discontinued an investigation or renewed an investigation after suspension.
2. Notification must be made as soon as possible, and no later than fifteen working days after the prosecutor has made a written decision to initiate, not initiate, suspend, renew, or discontinue an investigation.
3. Notification must include the information that the victim has the right to appeal the decision to the chief prosecutor within six months.
4. Notification must be made in accordance with Article 75(1), and must be done in a manner that prevents undue danger to the safety, well-being, and privacy of those who provided information to the prosecutor or to the police and in a manner that does not obstruct the investigation.

Commentary

Article 74 of the MCCP obliges the prosecutor to take reasonable steps to keep the victim informed of the progress of a case. The prosecutor should make his or her best efforts to inform the victim about the initiation, suspension, renewal, or discontinuation of a case. No means are specified as to how the victim should be notified. This will

depend on the individual circumstances of a state. In some states, there may be a postal service, although typically in a post-conflict state, the postal service is not functioning or reliable. In this case, the prosecutor should endeavor to make telephone or personal contact with the victim. These options may be difficult, however, if the victim does not have a phone or lives far from the prosecutor's office. Notice of the decision may be hand-delivered to the residence of the victim by an employee of the office of the prosecutor.

Any notification, whether written or oral, must not reveal information that would jeopardize the safety, well-being, or privacy of any person who has provided information to the police. In accordance with Article 75(3), where the prosecutor fails to effectively notify the victim or there are defects in the notification process, these problems will not affect the progress of the investigation or, later, the trial. Reference should be made to the commentaries to Articles 74 and 75 for a fuller discussion on the notification of victims.

Article 100: Appeal by a Victim on the Decision Not to Initiate an Investigation or on the Discontinuation of an Investigation

1. Upon receipt of the notification of the prosecutor's decision not to initiate or to discontinue an investigation, the victim may file a written appeal with the chief prosecutor.
2. The victim may appeal the decision of the prosecutor within six months of receipt of notification of the decision of the prosecutor not to initiate or to discontinue the investigation.
3. Upon consideration of the written appeal of the victim, the chief prosecutor may confirm the decision of the prosecutor or may order another prosecutor to initiate or continue the investigation.

Commentary

A victim of a criminal offense may be dissatisfied with the fact that the prosecutor has not initiated an investigation or initiated an investigation but later decided to discontinue it. Article 100 gives the victim the opportunity to challenge the decision of the prosecutor through a written appeal to the chief prosecutor. The chief prosecutor should consider the written appeal and decide whether to confirm the decision of the prosecutor or hand the investigation over to another prosecutor to initiate an investigation or resume an investigation that has been discontinued.

Article 101: Retention, Security, and Storage of Information and Evidence Relating to the Criminal Investigation

The prosecutor is responsible for the retention, storage, and security of all information, evidence, and physical material obtained in the course of an investigation until it is formally tendered into evidence in court. Evidence and physical material collected by the police in the investigation of a criminal offense must be transferred to the prosecutor without delay, unless otherwise ordered by the prosecutor.

Commentary

The responsibility to maintain and store all the materials that were gathered during the investigation falls on the prosecutor under the MCCP. Where the police have collected evidence, they must forward the relevant evidence and information to the prosecutor along with a written report. The prosecutor will retain the evidence until it is presented in court at the trial and officially tendered as evidence. At this point, the responsibility for maintaining the evidence falls on the court.

In order to store and secure the evidence in advance of the trial, the office of the prosecutor must have proper secure space, often known as the *evidence room*. The police may also have an evidence room in which to store evidence before handing it over to the prosecutor. It is important that there also be provision for the storage of sealed documents—such as documents related to witness protection (see Article 152), witness anonymity (see Article 160), or cooperative witnesses (see Article 166)—and other sensitive information or items in a room that has restricted access and is under lock and key. These documents or items should be stored separately from the general file on the particular criminal case.

Generally, it is good practice to have standard operating procedures to address issues such as who has access to the evidence room, who has access to the evidence, and the steps required to gain access.

Part 2: Records of a Criminal Investigation

Section 1: Records of Investigative Actions Undertaken by the Police or the Prosecutor

Article 102: Written Record of Actions Undertaken in a Criminal Investigation by the Police and the Prosecutor

1. The police and the prosecutor are required to keep a written record of each action undertaken in the course of the criminal investigation at the same time that the action is undertaken or, if this is not possible, immediately afterward.
2. Where the police execute an order or a warrant of the court, the police must make a written record of their actions in executing the order or warrant.
3. The police must deliver a copy of the written record of any action undertaken by them, including the execution of an order or a warrant, to the prosecutor as soon as possible after the action has been taken, and no later than forty-eight hours.
4. The written record must include:
 - (a) the name of the prosecutor or the identification number of the police officer taking the action;
 - (b) the place where the action is being undertaken;
 - (c) the date and time when the action begins and ends, and any interruptions in undertaking the action;
 - (d) the first names and surnames of persons present and the status in which they are present;
 - (e) the name of the suspect or the accused in the criminal case or the case number, if one has been assigned; and
 - (f) where a party to the action is vested with rights under the MCCP, the fact that the person undertaking the action informed the party of his or her

rights. The fact of whether the person exercised his or her rights must also be noted in the written record, along with the signature of the person verifying that he or she has been permitted to exercise his or her rights. If the person refuses to sign the record, the reasons for this must be noted in the record.

5. The written record must contain the essential information about the implementation and content of the action undertaken.
6. If objects or documents are seized in the course of the implementation of the action, this must be indicated in the record and the articles taken must be attached to the record or the place where they are kept must be identified.
7. In conducting actions such as the search of premises or persons, information that is important with regard to the nature of the action or for establishing the identity of certain articles (such as description, dimensions, and size of the articles or traces that have been left or the placing of identifying labels on articles) must also be entered in the record.
8. Any sketches, drawings, layouts, photographs, films, or other technical recordings that are made must be entered into the record and attached to the record.
9. The record must be kept up-to-date and nothing in it may be deleted, added, or amended. Corrections to the record must be noted at the end of the record.

Commentary

A lack of accurate record keeping and evidence cataloging and storage hinders the efficiency of an investigation and may affect the ability of the prosecutor to compile a strong case against an accused person. Keeping an accurate record is also important from the perspective of protecting the rights of suspects and the accused, particularly the right to defend oneself (Article 65) and the right to adequate facilities to defend oneself (Article 61). To adequately defend the accused, the defense should have access to records of actions taken during the investigation, the findings of these actions, and any evidence that may have been gathered, subject to the exceptions to disclosure set out in Chapter 10, Part 3, and elsewhere in the M CCP.

It is important to establish a system and structure of investigative record keeping. Article 102 provides general principles and requirements that could be supplemented by a standard operating procedure or memorandum of agreement between the police and the prosecutor on the recording of investigative acts and the transmission and storage of written records and evidence obtained in the course of these acts. Article 102 places a general requirement on the police and the prosecutor to record in writing all actions taken in the course of the investigation and for the written record of those actions to be put in the case file in the possession of the prosecutor (as per Article 101). Any evidence that is adduced during the investigative action by the police will be submitted to the prosecutor under Article 91.

Section 2: Records of the Questioning of a Suspect

General Commentary

It is imperative that accurate recording of the questioning of a suspect be undertaken. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that a record of all interrogations of suspects be kept (Principle 23). This requirement has also been expressed by the United Nations Human Rights Committee (General Comment no. 13, paragraph 11).

Article 103: Audio or Video Recording of the Questioning of a Suspect

1. Where a suspect is being questioned, every reasonable effort must be made to audio or video record the questioning, in accordance with the following procedure:
 - (a) the suspect must be informed, in a language he or she fully understands and speaks, that the questioning is to be audio or video recorded and that he or she may object if he or she so wishes;
 - (b) the fact that this information has been provided and the response given by the suspect concerned must be noted in the record;
 - (c) the suspect may, before replying, speak in private with his or her counsel, if counsel is present;
 - (d) if the suspect refuses to be audio or video recorded, the procedure in Article 104 must be followed;
 - (e) the suspect must be informed on tape of his or her rights under Article 107;
 - (f) in the event of an interruption in the course of questioning, the fact and the time of the interruption must be recorded before the audio or video recording ends as well as the time of resumption of the questioning;
 - (g) at the conclusion of the questioning, the suspect must be offered the opportunity to clarify anything he or she has said and to add anything he or she may wish; and
 - (h) the time of conclusion of the questioning must be noted.

2. The following facts must be noted on tape for the record:
 - (a) the time when and place where the questioning took place;
 - (b) the name of the person(s) who conducted and recorded the questioning, the name of the suspect, his or her counsel, if present, and any prosecutor, interpreter, or other person present during all or part of the questioning;
 - (c) the name of any appropriate adult present in accordance with Article 109; and
 - (d) the name of any responsible person present in accordance with Article 329.
3. The questioning must be transcribed as soon as feasible after the completion of the questioning. A copy of the transcript must be placed in the case file.
4. The audio- or videotape must be copied as soon as feasible after the completion of the questioning. One copy of the tape must be used for the purposes of transcription, and the other copy must be given to the suspect or his or her counsel.
5. A copy of the transcript of the questioning must be given to the suspect, in addition to the audio- or videotape, as soon as feasible after the completion of the questioning.
6. Upon the request of the prosecutor, the transcript and the copied audio- or videotape may be withheld from the suspect until the prosecutor has formally initiated the investigation under Article 94.

Commentary

Article 103 sets out the procedure to follow when an interview is audio or video recorded. Every reasonable effort should be made to ensure that an interview is recorded in this manner. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has stated that “the electronic (i.e., audio and/or video) recording of police interviews represents an important additional safeguard against the ill-treatment of detainees. . . . Such a facility can provide a complete and authentic record of the interview process, thereby greatly facilitating the investigation of any allegations of ill-treatment. This is in the interest both of persons who have been ill-treated by the police and of police officers confronted with unfounded allegations that they have engaged in physical ill-treatment or psychological pressure. Electronic recordings of police interviews also reduces the opportunity for defendants to later falsely deny that they have made certain admissions” (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), *12th General Report*, CPT/Inf [2002], paragraph 36, page 15). A similar statement has been made by the United Nations Special Rapporteur on Torture (UN document A/56/156, paragraph 39[f]) and the United Nations Committee against Torture (UN document A/51/44, paragraph 65[e]), and, further-

more, is contained in the African Commission on Human and Peoples' Rights Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (paragraph 28). Obviously, there are serious financial implications in the resourcing and upkeep of electronic or video recording equipment and facilities and in the transcribing or copying of tapes. In a post-conflict state, where resources are often limited, a written record may be the only option. Where it is not possible to electronically or videographically record the interview, the procedure set out in Article 104 should be followed.

As Paragraph 2 provides, it is particularly important that those persons present must be identified for the record. The United Nations Special Rapporteur on Torture has noted that in order to address concerns surrounding torture or cruel, inhuman, or degrading treatment (including the later investigation of allegations of such mistreatment), "each interrogation should be initiated with the identification of all persons present" (UN document A/56/156, paragraph 39[f]).

Article 104: Written Record of the Questioning of a Suspect

1. Where circumstances prevent the questioning of a suspect being audio or video recorded, a written record of the questioning must be made.
2. The record must note:
 - (a) why audio or video recording of the questioning of the suspect was not conducted;
 - (b) the date and place of the questioning;
 - (c) the start and end time of the questioning;
 - (d) the fact that the suspect being questioned has been informed of his or her rights under Article 107;
 - (e) the substance and content of the questioning, meaning any questions asked of the suspect and his or her answers and any other information provided by the interviewer(s) or the suspect;
 - (f) any interruptions in the course of questioning and the time of the interruption and the time of resumption of the questioning;
 - (g) the name of the person(s) who conducted and recorded the questioning, the name of the suspect, his or her counsel, if present, and any prosecutor, interpreter, or other person present during all or part of the questioning;
 - (h) the name of any appropriate adult present in accordance with Article 109; and

- (i) the name of any responsible person present in accordance with Article 329.
- 3. At the conclusion of the questioning, the suspect must be offered the opportunity to clarify anything he or she has said and to add anything he or she may wish. This statement must be noted as part of the record of questioning.
- 4. The suspect must be given the opportunity to read or have read to him or her the questioning record and to indicate if and how he or she considers it inaccurate.
- 5. The record must be signed by all persons present during the questioning. Where a person has not signed the record, the reasons for this must be noted.
- 6. A copy of the written record must be placed on the case file. A copy must also be made available to the suspect; however, the written records may be withheld until after the prosecutor has initiated the investigation under Article 94.
- 7. The record of the questioning must be placed in the case file.

Commentary

In the absence of equipment or facilities to audio or video record the questioning of a suspect, a written record must be made. This record must be as comprehensive as possible, noting both questions asked by the interviewer and answers elucidated from the suspect. Where it is not possible to take verbatim notes of the interview, the record must accurately record the statements of the suspect and must contain the exact wording of key statements made by the suspect. As with Article 103, crucial facts regarding the interview must be recorded in order to effectively safeguard the rights of the suspect to be free from torture or cruel, inhuman, or degrading treatment (set out in Article 58 of the MCCC). Date and place of questioning, start time and end time, interruptions and resumptions (which will be relevant for assessing whether Articles 106 and 107 have been respected), and the names of all persons present are crucial facts to include in the record, in addition to the substance of the questions asked and the answers received during the course of the questioning. At the end of the questioning, the suspect must be given the opportunity to read, or have someone read verbatim to him or her, what the record contains. The suspect must also be given the opportunity to make a clarifying statement at the end of questioning that must be included in the record. All persons must sign the record to attest to, first, their presence during the interview and, second, the accuracy of the interview record. The suspect and his or her lawyer must have access to the record under the disclosure obligations contained in Article 204. If the defense wishes to raise allegations of torture before disclosure obligations begin, the defense must be given access to the record.

Section 3: Records of the Questioning of Other Persons

Article 105: Written Record of the Questioning of Other Persons

1. A written record must be made of formal statements made by any person who is questioned in connection with an investigation.
2. The record must note:
 - (a) the date, time, and place of questioning;
 - (b) the fact that the person has been informed of his or her right to freedom from self-incrimination and that the questioning will be recorded and may be used as evidence in the proceedings;
 - (c) the fact that, where the person being questioned is a victim of a criminal offense, the victim has been informed of his or her interests under Articles 72–79 and Articles 99–100;
 - (d) the substance and content of the interview, meaning any question asked of the person and answers received and any other information provided by the person; and
 - (e) the names of the person(s) who conducted and recorded the questioning, the person being questioned, his or her counsel, if present, and any prosecutor, interpreter, or other person present.
3. The record must be signed by all persons present during the questioning. Where a person has not signed the record, the reason for this must be noted.
4. The record of the questioning must be placed in the case file.

Commentary

A written record of an interview with a person other than the suspect will suffice. If, however, facilities and equipment to audiotape or videotape the interview exist, they may be used (in which case a procedure similar to that outlined in Article 103 could be followed). Electronic recording will probably be beyond the resource capacity of a post-conflict state, which is why the MCCP provides for the written record of statement made by a person other than the accused.

Part 3: Collection of Evidence

General Commentary

Part 3 contains a wide range of modalities for investigating a criminal offense. Some of the modalities provided for in Part 3 are forensic (e.g., Article 142 on physical examinations and Article 145 on autopsies); some are regular investigative techniques found in criminal procedure codes around the world (e.g., questioning of suspects and other persons, search of premises or a dwelling and seizure of property under Articles 118–121, and search of persons under Articles 122–125), while others are more novel and highly technical (e.g., expedited preservation of computer data and telecommunications traffic data under Article 128; expedient preservation of property and freezing of suspicion transactions under Article 132; identification of a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 129; and covert and other technical measures of surveillance or investigation under Article 135).

Having an external authorization mechanism for certain investigative acts is standard practice in most states, although where this authorization comes from varies from state to state. In some states, an investigating judge may have the power to authorize these measures, while in other states, a prosecutor or a senior police officer (in states where the investigation is completely police led) may have the power to order many investigative acts. In many states, and under the MCCP, the judiciary is responsible for overseeing the majority of investigative measures. Judicial authorization provides an important oversight mechanism for investigative acts that are intrusive or that impinge upon the rights of persons. In a small number of instances, the prosecutor is responsible for overseeing the investigative action (e.g., expedited preservation of computer data and telecommunications traffic data under Article 128; expedient preservation of property and freezing of suspicion transactions under Article 132; identification of a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 129; and covert and other technical measures of surveillance or investigation under Article 135).

Permission to undertake many of the acts contained in Part 3 is usually sought through a warrant or an order from a competent court or judge. Warrants and orders differ only with regard to who can apply for them. A *warrant*, as defined in Article 1(46), is an order of the court issued after the written *application*, defined in Article 1(2), of either the prosecutor or the police to undertake a particular investigative measure. An *order*, as defined in Article 1(34), is an order of the court that is issued after a written *motion*, defined in Article 1(32), of the prosecutor or the defense. Both warrants and orders are sought by filing a motion with the registry of a competent trial court.

Part 3 addresses the range of measures requiring a warrant or an order and a number of measures that do not require a warrant or an order. Where a provision relates to a measure requiring a warrant or an order, the relevant article sets out the mechanism for applying for and granting warrants and orders. In many articles, there is also extensive treatment of how the particular investigative measure should be carried out and, in

some cases, supervised by the court. The MCCP contains more details on the implementation of investigative measures than many criminal procedure codes. In fact, the level of detail contained in the MCCP is similar to what might be contained in standard operating procedures or implementing or clarifying regulations that accompany the criminal procedure code. The inclusion of extra detail on the implementation of investigative measures was deliberate. In a post-conflict state, standard operating procedures or implementing or clarifying regulations may not exist or may take a long time to draft. In the absence of such legislation, the drafters considered it important to include a greater level of detail, particularly with regard to the implementation of complex investigative measures, such as covert surveillance, or other measures that previously may not have been carried out in accordance with best practice or with due regard for human rights standards, such as those for search and seizure and physical examination of persons. The provision of additional guidance on the implementation of complex or sensitive investigative acts is particularly important in a post-conflict context where some criminal justice actors may not have implemented such provisions previously.

In addition to providing an adequate level of detail in Part 3, the drafters paid particular attention to creating adequate procedural safeguards to protect the human rights of the individual while providing sufficient powers to investigate crime. During the drafting of Part 3, significant input was received from human rights advocates, legal scholars, police officers, prosecutors, judges, and defense counsel. The drafters were equally cognizant of the need for adequate record keeping and a “paper trail” of investigative measures in the drafting of Part 3; consequently, numerous reporting requirements have been integrated into the various articles.

Many of the methods for collecting evidence contained in Part 3, such as covert surveillance (Articles 134–140) and search and seizure of a computer (Article 130), require highly trained investigative staff. Before a post-conflict state considers implementing such investigative tools, the availability of qualified and trained personnel to implement them should be taken into consideration. It is also important to consider the cost of implementing these provisions.

Section 1: Questioning of Suspects, Victims, and Other Persons

Article 106: Guiding Principles on the Questioning of All Persons

1. Questioning under Article 106 means the solicitation of information from any person.
2. The aim of questioning a person in the course of a criminal investigation is to obtain accurate and reliable information in order to discover the truth about matters under investigation.

3. Questioning must be conducted with full respect for the rights and dignity of the person being questioned.
4. Questions must be asked in a clear, distinct, and precise manner.
5. Persons being questioned must be free from coercion, violence, or threat of violence or oppression or any form of torture or cruel, inhuman, or degrading treatment or coercion. In particular, in questioning a person, it is forbidden to:
 - (a) require the person being questioned to stand;
 - (b) place a hood over the person being questioned;
 - (c) expose the person being questioned to persistent or excessive noise;
 - (d) deprive the person being questioned of adequate sleep, food, or water;
 - (e) impair the person's freedom to form his or her own opinion and to express himself or herself by means of the administration of drugs or hypnosis;
 - (f) impair the person's memory or his or her ability to understand;
 - (g) threaten the person with measures not permitted by law; or
 - (h) promise something to the person being questioned that is not permitted by law.
6. In any period of twenty-four hours, a person being questioned must be allowed a period of at least eight continuous hours during which that person may rest and will not be questioned, transported from one detention center to another, or subjected to any interruption in connection with the investigation. The period of rest may not be interrupted or delayed unless there are reasonable grounds to believe that further questioning is necessary to avoid an imminent risk of harm to persons or the imminent serious loss of or damage to property.
7. Short breaks from interviewing must also be provided at intervals of approximately two hours, subject to the interviewing police or prosecutors' discretion to delay a break if there are reasonable grounds to believe that further questioning is necessary to avoid an imminent risk of harm to persons or the imminent serious loss of or damage to property.

Commentary

General reference should be made to Amnesty International's publication *Combating Torture: A Manual for Action*, which discusses relevant safeguards for persons in custody, including during questioning, in chapter 4. Reference may also be made to section 7.5 (pages 174–79) of Amnesty International's *Understanding Policing: A Resource for Human Rights Activists*, which contains a general discussion on police techniques in interviewing persons.

Paragraph 2: Paragraph 2, which states that the aim of questioning is to obtain accurate and reliable information, is particularly applicable to the questioning of a suspect. In some states, police or prosecutors work under the false assumption that the purpose of questioning a suspect is to obtain a confession. This often leads to the use of torture; cruel, inhuman, or degrading treatment; coercion; or acts of violence in order to force a confession. Paragraph 2 is derived from European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (*12th General Report*, CPT/Inf [2002], page 15, paragraph 35). CPT considers it important that the aim of questioning be made clear and furthermore that interviewing officers receive training on this standard.

Paragraph 3: This paragraph articulates a general principle that all the rights of the person being questioned should be respected as well as the particular right to be treated with dignity and respect. This right is found in the International Covenant on Civil and Political Rights (Article 10[1]).

Paragraph 5: The principles set out in Paragraph 5 are related to the right to freedom from torture or cruel, inhuman, or degrading treatment set out in Article 58. Reference should be made to Article 58 and its accompanying commentary. The principles contained in Paragraph 5 are also related to a person's right to freedom from self-incrimination and the right not to be compelled to testify against oneself or to confess guilt (see Article 57 and its accompanying commentary). Paragraph 5 expands the scope of the protections contained in Articles 58 and 61 by requiring that a person being questioned not be subjected to violence, the threat of violence, or oppression. Any act of hitting, striking, pushing, or otherwise interfering with the body of a person being questioned is prohibited. Threats to hurt the detainee are also prohibited. The concept of *oppression* contained in Paragraph 5 refers to the arbitrary exercise of the power of the interviewer.

Paragraph 5 provides some examples of inappropriate and unlawful questioning techniques, but this is not an exhaustive list. Unfortunately, the means and methods employed to commit violent, oppressive, coercive or cruel, inhuman, and degrading acts are many and varied. It is therefore impossible to capture all such means and methods. The first four examples have been used in several states as unofficial questioning techniques. Some states have used "wall standing," forcing a person to remain for hours in a "stress position," spread-eagle against a wall, with his or her fingers high above the head and his or her feet back, causing the person to place the full weight of the body on the toes and fingers. The European Court of Human Rights, in the case of *Ireland v. United Kingdom* (application no. 5310/71 [1978], ECHR 1 [January 18, 1978]), found that this method of questioning is contrary to a person's right to freedom from inhuman treatment, as is the hooding of a person during an interview, exposing the person to loud or persistent noise, and depriving the person of sleep, food, or water (paragraphs 167 and 168). Drugging a person or hypnotizing that person is impermissible, as are other means to impair the memory. In addition to threatening a person with violence or with other unlawful measures, one may not attempt to induce a person to give information by promising him or her something (for example, a bribe) that is impermissible under the applicable law.

Paragraph 6: As mentioned in the commentary to Paragraph 5, Article 58 provides that all persons have the right to freedom from torture or cruel, inhuman, or degrading treatment. Paragraph 5 prohibits certain conduct in questioning that is contrary to Article 61. Paragraph 6 adds to the list of prohibited conduct during questioning contained in Paragraph 5 by ensuring that a person being questioned is not subject to sleep deprivation. Sleep deprivation has been found to be a form of inhuman treatment under international human rights law by the European Court of Human Rights (*Ireland v. United Kingdom*, application no. 5310/71 [1978], ECHR 1 [January 18, 1978], paragraph 167). In the majority of cases, Paragraph 6 applies to persons who have been arrested, not to witnesses. An arrested person can be detained pending a hearing before a judge under Article 175, and therefore he or she is more likely to be questioned over a twenty-four-hour period than is a witness, who is free to leave at any time and who is not usually questioned for such an extended period as referred to in Paragraph 6.

Paragraph 7: It may be noted that any person including a suspect, who has not been arrested or detained under the MCCP is not compelled to succumb to questioning by the police and is free to leave at any point during the questioning.

Article 107: Questioning of a Suspect

1. Where the police or prosecutor question a suspect, prior to questioning, the person must be informed that he or she is a suspect in criminal proceedings.
2. The police or the prosecutor must inform a suspect prior to questioning, in a language the suspect speaks and understands, of the following rights to which he or she is entitled:
 - (a) the right to silence and not to incriminate himself or herself;
 - (b) the right to presence of counsel of the suspect's choice;
 - (c) the right to consult with counsel before and during the questioning; and
 - (d) the right to have the assistance of an interpreter, free of any cost, if the suspect cannot understand or speak the language being used for questioning, and such translations that are necessary to meet the requirements of fairness.
3. If the suspect exercises his or her right to counsel, the police or prosecutor must postpone or interrupt the questioning until counsel arrives or until two hours have passed. If, after two hours, counsel cannot be reached and the suspect does not select another counsel, or where counsel has not arrived, the police or the prosecutor may question the suspect. In exigent circumstances, where imminent danger to the lives of persons is present, the police

may, upon the verbal authorization of the deputy prosecutor, begin or continue to question a person even before counsel arrives.

4. The police or the prosecutor must inform a suspect prior to questioning that any statement that he or she makes during the questioning may be recorded and used in evidence against him or her later in the proceedings.
5. The police or the prosecutor must give the suspect the opportunity to dispel the grounds for suspicion against him or her and to assert facts in his or her favor at some point during the questioning.

Commentary

The questioning of a suspect may take place at any time. Article 107 applies to the questioning of all suspects, including those who have not been arrested or detained as well as those who have been arrested or detained and are at a police station or a detention center. Every time the suspect is questioned, the procedure set out in Article 107 must be repeated.

In addition to the requirements contained in Article 107, the questioning of a suspect must be recorded in accordance with Article 106, Article 103, or Article 104. Reference should be made to Articles 103 and 104 and their accompanying commentaries.

Paragraphs 1 and 2: Police and prosecutors should be given a simplified and standardized way to deliver the warnings contained in Paragraphs 1 and 2.

Article 108: Questioning of Deaf or Mute Persons

1. If a person being questioned is deaf or mute, a person who knows how to communicate with the deaf or mute person being questioned should be invited to act as an interpreter between the deaf or mute person and the police or prosecutor.
2. Where no interpreter is present, and where the person being questioned is deaf, he or she must be asked questions in writing.
3. Where no interpreter is present, and where the person being questioned is mute, he or she may answer the questions posed in writing.

Commentary

If a suspect appears to be deaf or mute, the police or the prosecutor must treat the person as such, in the absence of clear evidence to the contrary. Where possible, a person who knows sign language or who understands how to communicate with a deaf or mute person must be invited by the police or prosecutor to be present during the interview. Ordinarily, this person will be a member of the deaf or mute person's family.

Article 109: Questioning of Mentally Disordered or Mentally Vulnerable Persons

1. If the person being questioned is mentally disordered or otherwise mentally vulnerable, he or she must be interviewed in the presence of an appropriate adult.
2. An "appropriate adult" means:
 - (a) a relative, guardian, or other person responsible for the care or custody of a mentally disordered or otherwise mentally vulnerable person;
 - (b) someone experienced in dealing with mentally disordered or mentally vulnerable people but who is not a police officer or employed by the police; or
 - (c) failing these, some other responsible adult age eighteen years or over who is not a police officer, employed by the police, or employed by the office of the prosecutor.

Commentary

The term *mentally disordered or otherwise mentally vulnerable* is used as a generic term to denote a person who suffers from a mental illness or other mental incapacity such that he or she may not understand the significance of what is said during an interview or the questions asked or their answers. If a person appears to be mentally disordered or otherwise mentally vulnerable, the police or prosecutor should allow an appropriate adult to be present during the interview. Ideally, this person would be someone who is known to the person being questioned, such as a family member or guardian. Alternatively, a person with experience dealing with mentally ill persons, such as a social worker or mental health professional, may be invited to be present during the interview. Failing that, an independent third party not associated with the police must be invited to be present during the course of the questioning.

Article 110: Questioning of Victims and Other Persons

1. The police or the prosecutor must inform a victim or any other person prior to questioning that he or she is not obliged to answer individual questions by which he or she would incriminate himself or herself.
2. The police or the prosecutor must inform a victim or any other person that the questioning will be recorded and may be used as evidence in the proceedings.
3. A victim or another person being questioned may choose to have his or her lawyer present during the course of the questioning and may consult with his or her lawyer before and during the questioning.
4. The police or the prosecutor must inform a victim of his or her right to be notified of the progress of the case under Article 75, of any proceedings under Article 75, of the possibility of participating in the proceedings under Article 76, and of the victim's right to appeal a decision of the prosecutor not to initiate or to discontinue an investigation under Article 100.
5. Where the victim indicates a desire to be notified under Articles 74 and 75, the police or the prosecutor must take the name and contact information of the victim.
6. The questioning of a female victim of a sexually related offense or domestic violence must be conducted by a female police officer or prosecutor, where available, unless the victim does not object to a male police officer carrying out the questioning.

Commentary

In the course of an investigation, the police or prosecutor may interview the victim, witness, or any other person. The person being questioned is entitled to the right to freedom from self-incrimination set out in Article 57 of the MCCC and should be made aware of this right at the beginning of questioning. The person must also be made aware that the police will record the questioning (in compliance with Article 105) and that this evidence may be used in future proceedings. Where the person being interviewed is a victim, he or she must be informed of his or her right to be notified of the progress of the case under Articles 74 and 75. As a matter of good practice, it is advisable for the police to provide the victim with a full list of his or her rights under Articles 72–79 and Article 100 of the MCCC in order to ensure that these rights can be understood and exercised.

A female victim of a sexual crime or of domestic violence must, where possible, be interviewed by a female police officer. An interview can be an intimidating event for a victim; experience in states around the world has demonstrated that female victims are more comfortable with and often provide information that is more detailed to female police officers or prosecutors. In a post-conflict setting, where there is a shortage of criminal justice personnel in the first place, it may be difficult to find a female police officer every time a female victim is interviewed, but this standard should be worked toward as a matter of good investigative practice.

Section 2: General Provisions on Investigative Measures

Article 111: General Provisions on the Issuance of Warrants and Orders

1. Except as otherwise provided in the M CCP, a warrant or an order from a competent judge must be obtained prior to executing the following measures:
 - (a) search of premises and dwellings;
 - (b) search of a person and objects in his or her possession;
 - (c) search of a vehicle;
 - (d) seizure of a computer and access to computer data;
 - (e) a production order;
 - (f) temporary seizure of proceeds of crime or property used in or destined for use in a criminal offense;
 - (g) covert and other technical measures of surveillance and investigation;
 - (h) physical examination;
 - (i) DNA analysis;
 - (j) examination of the mental state of a suspect or an accused;
 - (k) autopsy and exhumation; and
 - (l) unique investigative opportunity.
2. Applications for the warrants and orders listed in Paragraph 1 may be submitted at any stage during the proceedings.
3. All warrants and orders must be written and issued in duplicate, of which one copy is kept with the registry.

4. When determining whether to grant a warrant or an order, the competent judge must do so in accordance with the principle of proportionality.
5. Where the warrant or order is requested by the prosecutor or the police, the original warrant or order must be kept by the prosecutor and added to the case file. The results of the investigative measures taken under Articles 118–146 must also be added to the case file.

Commentary

Paragraph 2: It is important to emphasize that, although the measures listed in Paragraph 1 are contained in the section on criminal investigation, they may be employed at a later stage of the proceedings. For example, a judge may order any of these measures during the confirmation hearing or during the trial, as provided for in Article 112(5).

Paragraph 4: Domestic and international courts have determined that the *principle of proportionality* means that there is a rational connection between the aim of a particular measure and the means used to pursue it, and that a fair balance must be struck between the demands of the general interest of the community in combating criminality and the requirements of the protection of the human rights of the person subject to a particular measure of criminal investigation.

Article 112: General Provisions on the Application for Warrants and Orders

1. The prosecutor may submit an application for any of the warrants or orders set out in Articles 118–146.
2. The police may submit an application for the warrants set out in Articles 119, 123, 128, and 129 only when carrying out urgent measures prior to the initiation of an investigation under Article 94 and during the investigation in exigent circumstances where the time it would take to seek a warrant or an order through the prosecutor could result in the loss of evidence.
3. The defense may request an order under Articles 131, 141, 144, and 145.
4. A victim may request an order under Article 133.

5. During a confirmation hearing under Article 201 or during a trial or an appeal, the court may order any of the measures set out in Article 111 under the court's power to order the production of additional evidence under Article 239.
6. Applications for warrants and orders must be written, except as otherwise provided for in the MCCP.

Article 113: General Provisions on the Execution of Warrants and Orders

1. Any warrant or order issued by a judge may be executed anywhere in [insert name of state] without further formal requests to other trial courts.
2. A warrant or order issued by a judge must identify by name or official capacity the person or persons authorized to execute the warrant or order.

Article 114: General Provisions on the Seizure of Objects and Documents

1. Under the conditions set out in the MCCP and in the applicable law, during a criminal investigation, the police are authorized to seize:
 - (a) objects or documents specified in a search warrant or an order issued by a competent judge;
 - (b) objects or documents with regard to which probable cause exists that they represent evidence of a criminal offense;
 - (c) objects or documents with regard to which probable cause exists that they were used in, acquired by, or came into existence through a criminal offense;
 - (d) objects that police have reason to believe are intended for use in an attack or to inflict injury upon a person;
 - (e) objects that police have reason to believe may endanger the general safety of the public or property; and
 - (f) objects that are subject to mandatory seizure or prohibited under the applicable law.

2. A record of all objects or documents seized during the criminal investigation must be made upon seizure. The record must include:
 - (a) a description, accompanied by a photograph, when possible, of the objects or documents seized;
 - (b) the date, time, and place of the seizure;
 - (c) the identity of the person from whom the objects or documents were seized;
 - (d) the identity of the authorized official who seized the objects or documents; and
 - (e) the reasons for seizure.
3. The record of all objects or documents seized during the criminal investigation must be signed by the authorized official who seized the objects or documents.
4. A copy of the record must be given to the person from whom the objects or documents were seized.
5. The seized objects or documents must be taken immediately to the prosecutor, along with the written record as detailed under Paragraph 2.
6. The prosecutor must order that objects or documents wrongfully seized be returned to their owner immediately or, if return is not immediately feasible, that the objects or documents are placed in storage, in accordance with Article 101, until such time as they can be returned to their owner.
7. Seized objects must be properly managed so as to prevent loss of value or deterioration in physical condition.
8. Seized objects and documents must be returned to the person from whom they were seized or to the owner as soon as the reasons for their seizure in criminal proceedings cease to exist, unless otherwise provided for in the MCCP or in the applicable law.
9. A person whose property has been seized during a criminal investigation may appeal the seizure under Article 295.

Commentary

Article 114 underscores the importance of handling, storing, managing, and record keeping by the police with regard to seized objects and documents. In many post-conflict states, poor records are kept of items seized. In addition, in some states, items may be lawfully seized but not returned to their rightful owner, as should be required by law. Moreover, objects or documents seized are often not properly dealt with; seized items should be placed in a bag, wrapped or sealed, and then tagged to identify the

owner and the case. Providing for a comprehensive and systematic methodology for the management of seized objects and documents is important not only for protecting the property rights of victims but also for preventing incidences in which police officers take personal ownership or make personal use of seized objects. Proper management of seized items also facilitates the criminal investigation process and ensures that valuable pieces of evidence are not lost. Article 114 does not provide for such a system but instead sets out broad guidelines on dealing with seized items. In addition to the provisions of the law on seizure of objects and documents, the police and the prosecution service should establish standard operating procedures on record keeping and managing seized objects.

Paragraph 1: Paragraph 1 consolidates the powers provided for in the MCCP and MPPA authorizing the police to seize objects and documents.

Article 115: Inadmissibility of Evidence Obtained without a Warrant or an Order

1. Where a warrant or an order is required under the MCCP for the execution of any of the measures under Part 3 of Chapter 8 and the measure was executed without a warrant or an order from a competent judge, the evidence obtained in the execution of such a measure is inadmissible as evidence before the court.
2. Where validation of a competent judge is required for a measure executed without a prior warrant or an order, and such measure is not validated by a judge in accordance with the MCCP, the evidence obtained in the execution of such a measure is inadmissible as evidence before the court.

Commentary

The MCCP contains two general exclusionary rules with regard to investigative actions under which evidence may be automatically deemed inadmissible as evidence at trial. The first rule, dealt with under Article 115(1), pertains to actions taken without a warrant or order from the court, where a warrant or order is required under the MCCP. Included under this exclusionary rule is the situation where the police or prosecutor have obtained a warrant or order but in undertaking the investigative action go beyond what is permitted in that order or warrant. In this case, the actions that went beyond the parameters of that which was specified in the warrant or order would be deemed to have been undertaken without a warrant. The second exclusionary rule, addressed under Article 115(2), pertains to a situation where the police or the prosecutor under-

takes an investigative action without a warrant, where a warrantless search is allowed under the MCCC (e.g., a search without a warrant under Article 120[1]). Under the MCCC, all such investigative actions require validation by a judge. Where no validation of a particular investigative action is obtained, any evidence obtained is inadmissible as evidence at trial.

It must be noted that Article 115 does not apply to the breach of the specification of a warrant, as when a warrant is executed outside of the hours specified in the warrant by the judge. Where the specifications of the warrant are breached, this will not automatically result in the exclusion of evidence, but the court should consider whether the evidence should be excluded under Article 115. Reference should be made to Article 115 and its accompanying commentary for a discussion of this discretionary exclusionary rule.

Section 3: Gathering Information from Suspects, Victims, and Other Persons

Article 116: Provisional Detention of Persons on the Scene of a Criminal Offense

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1. The police may detain any person found at the scene of a criminal offense where there is reason to believe:
 - (a) that the person could provide information relevant to the criminal investigation; and
 - (b) that gathering information from the person at a later time would be impossible or would significantly delay the proceedings, or would cause other difficulties.
 2. Detention under Paragraph 1 may last no longer than necessary to ascertain the name and address of the person who is provisionally detained and any other relevant information. Detention may not last longer than six hours.

Article 117: Taking of Photographs and Fingerprints of Arrested Persons and Other Persons

1. The police may photograph and take fingerprints of an arrested person.
2. The prosecutor may authorize the police to release the photograph for general publication, where it is necessary to establish the identity of the arrested person or in other cases where the release is important for effectively conducting the investigation.
3. If it is necessary to identify whose fingerprints have been found on certain objects, the police may take the fingerprints of persons who were likely to have come into contact with such objects.

Commentary

It is common practice for police to photograph and take the fingerprints of arrested persons. What happens to the photographs and fingerprints after they have been taken is more of an issue. Fingerprints may be tested against those found at the scene of a crime and used as evidence at trial; a photograph may be used to assist in identifying the suspect in a case. All these measures may be executed by the police without a warrant or other authorization. Authorization is required, however, when a photograph of a suspect is released to the general public. Because of the potential infringement upon the suspect's rights to privacy and to presumption of innocence, photographs may be released only where the prosecutor decides that the photograph is necessary either to establish the suspect's identity or to continue to conduct the investigation effectively.

Under Article 117, the police are allowed to take fingerprints without a warrant from both suspects and persons whom the police believe may have left fingerprints at the scene of the crime.

The MCCP does not address the issue of use of personal data such as photographs or fingerprints in the long term. Legislation on data protection is necessary to lay out the relevant rules on the use of fingerprints and photographs, including their storage and retention, who can access them, and whether they can be shared with other agencies or other states.

Section 4: Search and Seizure

General Commentary

The search of premises or a dwelling, whether the home of a person or the place of work, constitutes an invasion of privacy and is permissible only to ensure an effective criminal investigation. Section 4 was drafted in such a way as to balance individual rights, such as the right to privacy with criminal investigation needs. Section 4 was drafted with the input of police officials, human rights advocates, and academics with expertise in criminal investigative methods and is also based on research conducted on the search and seizure laws of many nations, in an effort to distill the best practices standards. This section contains all the information usually found in a criminal procedure code and more: certain elements of it are commonly seen in a standard operating procedure (SOP) or implementing/clarifying regulation on search and seizure. (Section 3 does not, however, contain tactical guidance on planning, reconnaissance, preparation, briefing, and the manner in which the search will be conducted that is often found in an SOP or implementing/clarifying regulation.)

Unauthorized search of premises or a dwelling is criminalized under Article 110 of the MCC. Reference should be made to Article 110 of the MCC for a discussion on the scope and meaning of this criminal offense.

Subsection 1: Search of Premises and Dwellings

Article 118: General Provisions on the Search of Premises and Dwellings

1. Entry into and search of premises or a dwelling may be executed when:
 - (a) probable cause exists that a specific person has committed a criminal offense; and
 - (b) probable cause exists that the search will result in the:
 - (i) apprehension of a suspect or an accomplice to the suspect; or
 - (ii) seizure or preservation of traces of a criminal offense or objects relevant to the investigation of the criminal offense.
2. Except as otherwise provided for in Article 120, a warrant is required for entry into and search of premises or a dwelling.

Commentary

Each state has developed jurisprudence on the meaning of *premises* and *dwellings* in the context of a search. The terms *premises* and *dwellings* under the M CCP are taken to mean private and business premises and all types of dwellings, including unconventional dwellings, such as vehicles and boats modified for living and sleeping, and other temporary dwellings (e.g., hotel rooms) or permanent dwellings. Land can also be considered a premises. A vehicle found on or in premises or dwelling that is the subject of a warrant may be searched as part of the premises or dwelling. (This warrant should be distinguished from one used to search a vehicle under Article 127, in which the search is directed solely at the vehicle rather than the premises on which the vehicle is located.) No warrant is needed for searches of public places (where a person has no reasonable expectation of privacy).

Reference should be made to Article 1(36) for the definition of *probable cause*.

Article 119: Search of Premises and Dwellings under a Warrant

1. An application for a search warrant may be submitted orally or in writing to the competent trial court.
2. An oral application for a search warrant may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
3. An oral application may be communicated to a competent judge by telephone, radio, or other means of electronic communication. The elements required in a written warrant, detailed under Paragraphs 5 and 6, must be orally relayed to the competent judge.
4. Where an oral application for a search warrant is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the search warrant and for placing the notes in the court file within twenty-four hours. The written notes must be signed by the competent judge. The applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
5. Where a written application for a search warrant is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) a description and location of the premises or dwelling that is the subject of the application for a search warrant;

- (c) the particular criminal offense(s) to which the application relates and the alleged perpetrator(s) of the criminal offense(s);
 - (d) a statement declaring whether the purpose of the search warrant is for locating a suspect or his or her accomplices or for locating evidence of the criminal offense. Where the search warrant is sought in order to locate evidence of the criminal offense, the application must outline the specific evidence sought;
 - (e) the facts that substantiate the probable cause that the suspect, his or her accomplices, or evidence traces of the criminal offense will be found at the designated premises or dwelling; and
 - (f) a request that the competent judge issue a search warrant in order to find the person(s) or evidence as described in Subparagraph (d).
6. An application for a search warrant may also contain:
- (a) a request that the search warrant be executable at any time of day or night, where probable cause exists that the execution of the search warrant at any time of day or night is necessary for the effective execution of the warrant or for the safety of the persons involved in the search; or
 - (b) a request that the executing authorized official execute the warrant without prior presentation of the warrant, where there is probable cause that the evidence sought may be easily and quickly tampered with, removed, or destroyed if not seized immediately, or where there is a danger to the safety of persons involved in the search, or other persons, if the warrant is presented.
7. The competent judge may issue a search warrant upon the consideration of the oral or written application, where the criteria set out in Article 118 are met.
8. The warrant must contain the following:
- (a) the name of the issuing court and the signature of the competent judge who issued the search warrant;
 - (b) the time, date, and place of issuance, where the search warrant has been obtained through an oral request;
 - (c) the name and details of the person to whom the warrant is addressed and the title or rank of the person(s) authorized to execute the warrant;
 - (d) the purpose of the search;
 - (e) the name and description of the person or persons being sought or a description of the evidence of the criminal offense being sought;
 - (f) a description of the dwelling or premises to be searched, including the address, ownership, and any other means of identification;

- (g) a direction that the warrant must be executed between the hours of 6:00 a.m. and 9:00 p.m., or, where authorized by the court, a direction that the warrant may be executed at any other time;
 - (h) authorization for the executing authorized official to enter the premises without giving prior notice, where relevant;
 - (i) a direction that the warrant and any objects or documents seized should be delivered to the prosecutor without delay;
 - (j) an instruction that the resident of premises or a dwelling to be searched is entitled to notify his or her lawyer and that the search must be postponed for a maximum of two hours after counsel has been informed about the search, except where exigent circumstances exist or where his or her lawyer cannot be reached; and
 - (k) the expiration date of the warrant.
9. A search warrant is valid for fourteen working days, beginning on the date it was issued, except as otherwise specified by the judge in the warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained without a valid warrant is inadmissible at trial.

Article 120: Search of Premises and Dwellings without a Warrant

1. Entry into, search of, and seizure of property from premises or a dwelling can be executed without a search warrant where:
- (a) a resident over the age of eighteen years old of the premises or dwelling voluntarily consents to a search;
 - (b) the entry and search are necessary to safeguard or preserve the scene of a criminal offense;
 - (c) the police are in hot pursuit of a suspect who enters the premises or dwelling;
 - (d) there is an immediate danger to the safety or security of a person or persons in the premises or dwelling; or

- (e) there is an immediate danger that the person to be apprehended at the premises will flee or that evidence relevant to the investigation will be tampered with, removed, or destroyed before a search warrant could be obtained from a judge.
- 2. A search without a warrant under Paragraph 1(a) may be conducted only when the resident confirms his or her consent to the search by signing a waiver prior to its commencement. The resident may revoke his or her consent at any time during the search, whereupon the search must be terminated immediately.
- 3. Where a search is conducted without a warrant for the reasons detailed under Paragraph 1, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent trial court.
- 4. The competent judge must determine whether the search was executed in accordance with the MCCP, and in particular whether the conditions under Article 118 and under Paragraph 1 of Article 120 have been met. Where the competent judge concludes that the search without a warrant was conducted in accordance with the MCCP, he or she must issue an order validating the search without a warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained through a search without a warrant (that falls outside the exceptions provided for in Paragraph 1) is inadmissible at trial where validation from the judge is not obtained under Paragraph 4.

Article 121: Execution of a Search of Premises or Dwellings

1. The police may use reasonable force to enter premises or a dwelling during a search where:
 - (a) there is no response to the police knocking on the door of the premises or dwelling;
 - (b) the resident or other persons present in the premises or dwelling resist entry;
 - (c) the premises or dwelling is uninhabited or unoccupied; or

- (d) a substantial risk exists that giving advance notice of entry will result in armed resistance or might endanger the lives or health of people or that the evidence will be tampered with, removed, or destroyed.
2. A reasonable effort must be made to ensure that the search is conducted in the presence of the resident of the premises or dwelling or other persons present at the time the search warrant is being executed.
 3. If necessary for the conduct of the investigation, and while the search is being made, the police may prohibit any person present from leaving the premises or dwelling and may require other persons to be present.
 4. When a search is executed under a warrant, a copy of the search warrant must be given to the resident of the premises or dwelling at the time the warrant is executed, except if otherwise provided for in the warrant. If no residents are present, a copy of the warrant must be given to any other person present at the premises or dwelling at the time of the search. If no one is present, a copy of the warrant must be left at the premises or dwelling.
 5. Upon entry and prior to the search, a resident of the premises or dwelling being searched must be given the opportunity to voluntarily hand over objects sought to the police.
 6. A resident of the premises or dwelling being searched must be informed that he or she has the right to notify his or her counsel, who may be present during the search. If the resident demands that counsel be present during the search, the police must postpone the beginning of the search until the arrival of counsel.
 7. The postponement of the search under Paragraph 6 may last no longer than two hours after counsel has been informed about the search. In exigent circumstances where there is a substantial risk that postponement under Paragraph 6 will result in evidence being tampered with, removed, or destroyed or will endanger the lives or health of people, or where counsel cannot be reached, the police may begin with the search even before the expiration of the two-hour time limit.
 8. Where no residents or persons are present at the time of the search, the police must, where possible, provide for the presence of at least one independent observer, who must sign the record of the search.
 9. In executing the search warrant, only objects and documents that relate to the purpose of the search, as set out in the warrant, may be seized.

Commentary

The provisions on the execution of a search were drafted after a comprehensive survey of comparative domestic legislation on search of premises and dwellings. Best practices standards were identified and then integrated into Article 121. Many features of Article 121—such as the requirement that the resident be given a copy of the warrant, the requirement that counsel may be present during the search, and the use of an independent observer where no resident is present—have been integrated into the criminal procedure law of many post-conflict and transitional states. Many experts argue that in post-conflict states, where the police may not have been trusted by the general public or may have routinely violated the rights of the population in the execution of its powers (such as the power to search premises and dwellings), it is important to integrate oversight mechanisms such as the presence of a lawyer or observer at the scene of the search. Thus, Paragraph 8 of this article introduces this safeguard.

Subsection 2: Search of a Person and Objects in His or Her Possession

Article 122: General Provisions on the Search of a Person

1. A search of a person means the examination of the exterior of a person's body, including that person's mouth and hair. Such a search also includes the examination of a person's clothes and other things he or she has on his or her person and the examination of bags, packages, and other objects that a person has in his or her possession or under his or her control at the time of the search.
2. A search of a person may be executed where probable cause exists that the search will result in the seizure or preservation of evidence of a criminal offense.
3. Except as otherwise provided for in Article 124, a warrant is required for a search of a person.

Commentary

It is worth distinguishing a search of a person under Article 122 from other forms of searches. Article 122 does not cover a security search that would be conducted at a police station or detention center when a person is searched upon admission. Nor does

Article 122 cover what is known colloquially as a *stop and frisk* or a *pat down* search, which is a search that may be conducted by police to dispel danger, such as where a person is suspected of carrying a dangerous weapon. A frisk involves the patting of the outer clothing of a person to detect by sense of touch if a concealed weapon or other dangerous items are being carried. This power is not a matter of criminal procedure but of policing law and is dealt with under the MPPA.

A search of a person under Article 122 is also distinct from a physical examination under Article 142. There are great differences among legal systems as to what measures represent a search of a person and what measures constitute a physical examination. For example, in some systems a search of a person relates only to the search of the person's clothes and other items in his or her possession. In other systems, a search of a person may allow the examination of the body of a person, where grounds exist. Under the M CCP, a search of a person covers a full search of the exterior of a person's body, including the person's mouth and hair. A physical examination, in contrast, is classified as a forensic measure under the M CCP, as blood or cells may be taken from the person and the interior of his or her body (i.e., bodily orifices) may be examined. A physical examination is much more intrusive than a search of a person and thus is subject to stricter controls.

Whatever the definition of a search of a person, the most important element is that the legal provisions regulating it adequately protect the rights of the person subject to the search, while allowing for the effective investigation of the criminal offense. The European Court of Human Rights has held that the right to privacy of the individual is taken to encompass the physical integrity of the person (see *X & Y v. The Netherlands*, application no. 8978/80 [1985], ECHR 44 [October 27, 1985]), and therefore the right to privacy must be adequately balanced against the need to conduct an effective criminal investigation by incorporating a range of procedural safeguards. Article 122 seeks to adequately balance the right to privacy against the needs of the criminal investigation. It also seeks to set out a comprehensive framework on body searches rather than merely providing broad principles. In this way, Article 122 lies somewhere between a usual criminal procedure provision on search of persons and a standard operating procedure or an implementing or clarifying regulation, with much more detail than the former and less detail than the latter. Articles 122–125 are based on research on the laws, procedures, and best practices standards of many different states.

An unauthorized search of a person and his or her belongings is classified in the MCC as a criminal offense. Reference should be made to Article 109 of the MCC and its accompanying commentary.

Article 123: Search of a Person under a Warrant

1. An application for a search of a person may be submitted orally or in writing to the competent trial court.

2. An oral request for a search of a person may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
3. An oral application may be communicated to a competent judge by telephone, radio, or other means of electronic communication.
4. Where an oral application for a search warrant is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the warrant and placing the notes in the court file within twenty-four hours. The written notes must be signed by the competent judge. The applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
5. Where a written application for a search warrant is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person against whom the warrant for a search is sought;
 - (c) the particular criminal offense that he or she is suspected of or the evidence sought that is necessary for the investigation;
 - (d) the facts that indicate that the search is necessary;
 - (e) a request that the competent judge issue a warrant for a search in order to find the person or objects, as described under Article 122(2).
6. The competent judge may issue a search warrant upon the consideration of the oral or written application, where the criteria set out in Article 122 are met.
7. The warrant must contain the following:
 - (a) the name of the issuing court and the signature of the competent judge who issued the search warrant;
 - (b) the time, date, and place of issuance, where the search warrant has been obtained through an oral request;
 - (c) the name and details of the person to whom the warrant is addressed and the title or rank of the person or persons authorized to execute the warrant;
 - (d) the purpose of the search;
 - (e) a description of the evidence of the criminal offense or other objects relevant to the investigation of the criminal offense that are being sought;
 - (f) a direction that the warrant and any evidence seized should be delivered to the prosecutor without delay; and
 - (g) the expiration date of the warrant.

8. A search warrant is valid for fourteen working days after the date on which it was issued, except as otherwise specified by the judge in the search warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained without a valid warrant is inadmissible at trial.

Article 124: Search of a Person without a Warrant

1. A search of a person may be executed without a warrant where:
 - (a) a person consents to a search;
 - (b) a person is being arrested or detained and the police have reasonable grounds to believe that:
 - (i) the person is carrying, transporting, or has under his or her possession firearms, explosives, or other weapons or objects that can be used for an attack, self-injury, or injury of other persons, or to aid the person in fleeing the scene; or
 - (ii) the search will result in the preservation of the evidence of a criminal offense and there is an immediate danger the evidence will be tampered with, removed, or destroyed before a warrant could be obtained from a judge.
2. A search without a warrant under Paragraph 1(a) can be conducted only when the person to be searched confirms his or her consent to the search by signing a waiver prior to the search. The person may revoke his or her consent at any time during the search, whereupon the search should be terminated immediately.
3. Where a search of a person is conducted without a warrant under Paragraph 1, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent judge.
4. The competent judge must determine whether the search was executed in accordance with the MCCP and, in particular, whether the conditions under Paragraph 1 have been met. Where the competent judge concludes that the search without a warrant was conducted in accordance with the MCCP, the judge must issue an order validating the search without a warrant.

Commentary

Reference should be made to Article 115, which provides that evidence obtained through a search without a warrant (that falls outside the exceptions provided for in Paragraph 1) is inadmissible at trial where validation from the judge is not obtained under Paragraph 4.

Paragraph 1(b): The terms *arrested* and *detained* used in this paragraph may include a person whose movement has been restricted at the crime scene under Article 116 or a person whose movement has been restricted during the search of premises or a dwelling under Article 121.

Article 125: Execution of a Search of a Person

1. A search of a person must be conducted in a respectful manner.
2. A search of a person must be conducted by a person of the same sex as the person being searched. If a police officer of the same sex as the person being searched is not present at the place of the search, the police officer may authorize and instruct any suitable person of the same sex to perform the search.
3. The search must be conducted out of sight and presence of persons of the opposite sex.
4. A record of the search of a person must be made and must include:
 - (a) the name of the person searched;
 - (b) the name of the person who conducted the search; and
 - (c) the name of any other persons present during the search;
 - (d) a list of items seized during the search.
5. The person who was searched must be given a record of the search.

Commentary

Article 125 provides a number of core principles that must be adhered to in executing a search of a person. The search must be conducted respectfully (Paragraph 1), by a person of the same sex as the person being searched (Paragraph 2), and out of sight or presence of persons of the opposite sex (Paragraph 3). In some post-conflict states,

such as East Timor, where there is a lack of female police officers to conduct searches, the only solution possible is for a female who is not a police officer to be deputized by a male police officer to search the female suspect under the instruction of the male police officer, who cannot see the search but is close enough in proximity to direct the person conducting the search.

Paragraphs 4 and 5: As with all investigative acts, an accurate record of the search must be kept. Paragraph 4 lays out the requirements of what should be recorded; Paragraph 5 requires that the person who is searched be given a record of the search. This record will include a list of items that were seized; any seized property must be recorded and properly managed. Reference should be made to Article 114, which addresses the recording and management of seized objects or documents in greater detail.

Subsection 3: Search of Vehicles

Article 126: Inspection of a Vehicle

1. An inspection of a vehicle means a provisional examination of the accessible areas outside and inside the vehicle or other mode of transport, including the driver's and passenger's areas, glove and other compartments, and trunk.
2. The police may perform an inspection of a vehicle without a warrant where:
 - (a) probable cause exists that a criminal offense has been committed; and
 - (b) there is reason to believe that the search will result in the:
 - (i) apprehension of a suspect or an accomplice to the suspect; or
 - (ii) the seizure or preservation of evidence of a criminal offense.
3. The police may also perform an inspection of a vehicle without a warrant where:
 - (a) a person in the vehicle is being arrested or detained; and
 - (b) there are reasonable grounds to believe that the person is carrying, transporting, or has under his or her possession firearms, explosives, or other weapons or objects that can be used for an attack, self-injury, or injury of other persons, or to aid the person in fleeing the scene.
4. A record of the inspection must be made and must include:
 - (a) the name of the person whose vehicle was inspected;
 - (b) the name of the person who conducted the inspection;

- (c) the name of any other persons present during the inspection;
 - (d) a list of items seized during the inspection.
5. The person whose vehicle was inspected must be given a record of the search.

Commentary

An inspection of a vehicle involves only a provisional search of that vehicle by the police. No warrant is required where the criteria set out in Paragraphs 2 and 3 are met. A provisional examination of a vehicle is premised on the urgency of the situation. Given that the provisional examination is carried out without a warrant and without judicial supervision, the scope of it is limited. Paragraph 1 refers to the “accessible areas outside and inside the vehicle.” This means that the police cannot dismantle parts of the car in the course of their inspection or authorize a mechanic to do so. An inspection refers to the visual examination of the vehicle’s accessible parts. To dismantle a car, a warrant under Article 127 would be required. Article 127 refers to a “thorough examination of the outside and the inside of the vehicle,” which implies that the vehicle, or parts of it, may be dismantled for further and more comprehensive investigation.

Paragraph 3(a): The terms *arrested* and *detained* used in this paragraph may include a person whose movement has been restricted at the crime scene under Article 116 or a person whose movement has been restricted during the search of premises or a dwelling under Article 121.

Article 127: Search of a Vehicle

1. A search of a vehicle means a thorough examination of the outside and inside of the vehicle or other mode of transport, including the driver’s and passenger’s areas, glove and other compartments, and trunk.
2. A search of a vehicle may be executed when:
 - (a) probable cause exists that a specific person has committed a criminal offense; and
 - (b) probable cause exists that the search will result in the:
 - (i) apprehension of a suspect or an accomplice to the suspect; or
 - (ii) seizure or preservation of evidence of a criminal offense.

3. Except as otherwise provided for in Paragraph 9, a warrant is required for a search of a vehicle.
4. An oral request for a search of a vehicle may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
5. An oral application may be communicated to a competent judge by telephone, radio, or other means of electronic communication.
6. Where an oral application for a search warrant is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the warrant for a search of a person and for placing the notes in the court file within twenty-four hours. The written notes must be signed by the competent judge. The applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
7. Where a written application for a warrant to search a vehicle is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person who owns the vehicle that is the subject of the application for a warrant to search a vehicle;
 - (c) the particular criminal offense in connection with which the application for the search of a vehicle is sought;
 - (d) the facts indicating the probable cause that the search will result in the apprehension of a suspect or an accomplice to the suspect or the seizure or preservation of evidence of a criminal offense; and
 - (e) a request that the competent judge issue a warrant for the search of a vehicle in order to find the intended results of the search described in Paragraph 2(b).
8. The competent judge may issue a warrant to search a vehicle upon consideration of the oral or written application, where the criteria set out in Paragraph 2 are met.
9. A search of a vehicle may be executed without a warrant where:
 - (a) a person in possession of the vehicle consents to a search;
 - (b) there is an immediate danger deriving from the vehicle to the safety or security of persons; or
 - (c) there is an immediate danger that evidence relevant to the investigation will be tampered with, removed, or destroyed before a search warrant could be obtained from a judge.

10. A search of a vehicle without a warrant under Paragraph 9(a) can be conducted only when the person to be searched confirms his or her consent to the search by signing a waiver prior to the search. The person may revoke his or her consent at any time during the search, whereupon the search should be terminated immediately.
11. A record of a vehicle search must be made and must include:
 - (a) the name of the person whose vehicle was searched;
 - (b) the name of the person who conducted the search;
 - (c) the name of any other persons present during the search;
 - (d) a list of items seized during the search.
12. Where a search of a vehicle is conducted without a warrant under Paragraph 9, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent judge.
13. The competent judge must determine whether the search was executed in accordance with the MCCP and, in particular, whether the conditions detailed under Paragraph 9 have been met. Where the competent judge concludes that the search without a warrant was conducted in accordance with the MCCP, the judge must issue an order validating the search without a warrant.
14. The person whose vehicle was searched must be given a record of the search.

Commentary

As discussed in the commentary to Article 126, a search of a vehicle is a broader measure than an inspection of a vehicle and may include the complete dismantling of a car.

Reference should be made to Article 115, which provides that evidence obtained through a search without a warrant (that falls outside the exceptions provided for in Paragraph 9) is inadmissible at trial where validation from the judge is not obtained under Paragraph 12.

Subsection 4: Preservation of and Access to Computer Data and Telecommunications Traffic Data

Article 128: Expedited Preservation of Computer Data and Telecommunications Traffic Data

1. A prosecutor may make an order to secure the expeditious preservation of specified computer data and telecommunications traffic data that has been stored by means of a computer or a telecommunications system, where:
 - (a) probable cause exists that a criminal offense has been committed;
 - (b) the prosecutor has reason to believe that the data is relevant to the investigation of the criminal offense; and
 - (c) there are grounds to believe that the data concerned is particularly vulnerable to loss or modification.
2. Where an immediate danger exists that the data concerned will be lost or modified, an order to secure the expeditious preservation of specified computer data or telecommunications traffic data may also be made by the police. The police must promptly inform the prosecutor of the order. The prosecutor must determine whether conditions for the issuance of the order exists and either validate or annul the order of the police.
3. An order to obtain the expeditious preservation of computer or telecommunications traffic data may be made against:
 - (a) a specified person who is in possession or control of the data concerned; or
 - (b) a service provider or providers.
4. An order to obtain the expeditious preservation of specified computer data or telecommunications traffic data must require the person against whom the order is directed to preserve and maintain the integrity of the computer data or the telecommunications traffic data to enable the competent authorities to later seek a warrant to obtain access to it and its disclosure.
5. The order to obtain the expeditious preservation of specified computer data or telecommunications traffic data must include a warning of the consequences of noncompliance with the order set out in Paragraph 6.

6. Where a person fails to comply with an order to obtain the expeditious preservation of specified computer data or telecommunications traffic data, the prosecutor or the police may request the court to issue an order of noncompliance, which can require the person who has breached the order to be detained until such time as he or she complies or until compliance becomes irrelevant. The term of detention imposed by the court must not exceed four weeks. An order for noncompliance with an order to obtain the expeditious preservation of specified computer data or telecommunications traffic data may be appealed by way of interlocutory appeal under Article 295.
7. An order to obtain the expeditious preservation of specified computer data or telecommunications traffic data may oblige the person against whom the order is directed to keep confidential the order to obtain the expeditious preservation of the specified computer data or telecommunications traffic data for the duration of the order's application.
8. The order to obtain the expeditious preservation of specified computer data or telecommunications traffic data may require that the service provider disclose a sufficient amount of traffic data to enable the police and the prosecutor to identify a service provider and the path through which the communication was transmitted.
9. The order to obtain the expeditious preservation of specified computer data or telecommunications traffic data can be issued for a period of up to seventy-two hours. Upon expiration of this time limit, the order may be renewed only by a competent judge upon the written application of the prosecutor.
10. A judge may renew the order to obtain the expeditious preservation of specified computer data or telecommunications traffic data for a period of time as long as necessary up to a maximum of ninety days, or up to a maximum of one hundred and eighty days where the order has been made in response to a request for mutual legal assistance under Chapter 14, Part 1.

Commentary

Article 128 is directed at a service provider or another person who is in possession or control of computer data or telecommunications traffic data that must preserve that data. Article 128 allows the prosecutor and the police, in cases of urgency under Paragraph 2, to order the service provider or other person to preserve or secure data that is relevant to the criminal investigation. This particular procedural power is inspired by Articles 16 and 17 of the Council of Europe Convention on Cybercrime (hereafter Convention on Cybercrime). Because of its newness, it is absent from many domestic criminal procedure codes, but it may be a valuable addition. The power to preserve computer and telecommunications data is pivotal to the investigation of cybercrime offenses (such as those contained in Section 16 of the Special Part of the MCC) and a range of

other offenses such as child pornography (Article 118 of the MCC). According to the *Explanatory Report to the European Convention on Cybercrime* (hereafter *Explanatory Report*), “[t]he ever-expanding network of communications opens new doors for criminal activity in respect of both traditional offenses and new technological crimes. Not only must substantive criminal law keep abreast of these new abuses, but so must criminal procedure law and investigative techniques. . . . [Preservation of stored computer data] is an important new investigative tool in addressing computer and computer-related crime, especially crimes committed through the Internet. First, because of the volatility of computer data, the data is easily subject to manipulation or change. Thus, valuable evidence of a crime can be easily lost through careless handling and storage practices, intentional manipulation or deletion designed to destroy evidence or routine deletion of data that is no longer required to be retained” (paragraphs 132 and 155).

A *service provider*, according to Article 1(c) of the Council of Europe Convention on Cybercrime, is “any public or private entity that provides to users of its service the ability to communicate by means of a computer system, and any other entity that processes or stores computer data on behalf of such communication service or users of such service.” The term *computer data*, according to Article 1(b) of the Convention on Cybercrime, means “any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function.” Computer data is also called *information technology data*. The term *traffic data* refers to information, including the location data that indicates the origin, destination, route, time, date, size, duration, or type of a communication conducted via telephones, computer networks, or other forms of telecommunications and information technology or the type of underlying service (Article 1[d] of the Council of Europe Convention on Cybercrime). The term *telecommunications data* includes data about fixed telephones, mobile phones, VoIPs (Internet phones), e-mail messages, text messages, multimedia messages, Internet communications, and so forth.

According to the *Explanatory Report*, “speed and, sometimes, secrecy are often vital for the success of an investigation” (paragraph 133). The powers in Article 128 pave the way for the prosecutor to access information. These powers do not give police carte blanche to view computer data without a warrant. When the police are authorized to preserve computer data, they are not allowed to access all the data that is preserved; the data is merely preserved and kept safe, pending the issuance of a warrant allowing the police and prosecutor to view it. For access to preserved computer data, the prosecutor may apply under Article 130 (providing for seizure of computer data) for access to telecommunications traffic data, Articles 134–140 (providing for covert technical measures of surveillance), or Article 131 (providing for production orders). A production order would be easier to obtain because it requires a lower threshold of proof; however, a company required to produce telecommunications traffic data is not required to keep this request confidential as it would be with regard to a covert measure (as required by Article 137[7]). Moreover, a covert measure is not necessarily a one-time measure, whereas a production order is.

Under Articles 134–140, the prosecutor may apply for the real-time collection of telecommunications traffic data. It may be noted that Article 128 refers to computer data that is stored and accessible to a service provider or another person. According to the *Explanatory Report*, the powers of the sort contained in Article 128 of the MCCP “do not apply to the real-time collection and retention of future traffic data or to real-

time access to the content of communications. . . . The measures described in the article operate only where computer data already exists and is currently being stored” (paragraphs 149–150). The *Explanatory Report* also notes that *data preservation* must be distinguished from *data retention*: “while sharing similar meanings in common language, they have distinctive meanings in relation to computer usage. To preserve data means to keep data, which already exists in a stored form, protected from anything that would cause its current quality or condition to change or deteriorate. To retain data means to keep data, which is currently being generated, in one’s possession into the future. Data retention connotes the accumulation of data in the present and the keeping or possession of it into a future time period. Data retention is the process of storing data. Data preservation, on the other hand, is the activity that keeps stored data secure and safe” (paragraph 151).

During the time in which computer data or telecommunications data is being preserved, the service provider or other person in possession or control of the stored computer data does not have to render the data inaccessible to legitimate users (*Explanatory Report*, paragraph 159). The investigation of computer-related criminal offenses or criminal offenses that are committed through the Internet requires specific skills and expertise. Considerable training of a cadre of police officers and prosecutors in computer-related investigative techniques is required prior to implementing a power such as that contained in Article 128. It is also important that a state possess a law dealing with telecommunications or Internet service providers that supplements criminal procedure powers by setting out the duties of service providers with regard to police investigations and the preservation or disclosure of computer data, including traffic data.

Paragraph 6: Usually, the penalty for failure to comply with an order of the prosecutor under Article 128 would be prescribed as an administrative offense under the telecommunications laws. Because there is no such element to the Model Codes, Paragraph 6 provides for such. Reference should be made to Article 295, on interlocutory appeals, which provides a mechanism to appeal the trial judge’s determination under Paragraph 6.

Article 129: Identification of a Subscriber, Owner, or User of a Telecommunications System or Point of Access to a Computer System

1. A prosecutor may make an order to a telecommunications service provider to disclose to him or her:
 - (a) the identity of a subscriber, owner, or user of a specific telecommunications device or point of access to a computer system;

- (b) the identification of the telecommunications device or point of access to a computer system; or
 - (c) information about whether a specific telecommunications device or point of access to a computer system is in use or active or has been in use or active at a specific time.
- 2. A prosecutor may make an order under Paragraph 1 where:
 - (a) reasonable suspicion exists that a criminal offense has been committed; and
 - (b) there are grounds to believe that data requested under Paragraph 1 represents evidence of a criminal offense or can facilitate the execution of further investigative measures.
- 3. Where an immediate danger exists that the data concerned will be lost or modified, an order under Paragraph 1 may also be made by the police. The police must promptly inform the prosecutor of the order. The prosecutor must determine whether conditions for the issuance of the order exist and either validate or annul the order of the police.
- 4. The order to the telecommunications service provider to disclose certain data may oblige the person against whom the order is directed to keep the order confidential for the duration of its application.
- 5. The order to identify a subscriber, owner, or user of a telecommunications device or point of access to a computer system must include a warning that noncompliance with the order may result in a fine, as set out in Paragraph 6.
- 6. Where a person fails to comply with the order to identify a subscriber, owner, or user of a telecommunications device or point of access to a computer system, the prosecutor may apply to the court to issue an order of noncompliance that can require the person who has breached the order to be subject to a fine not exceeding [insert monetary amount]. The order may be appealed by way of interlocutory appeal under Article 295.

Commentary

Like Article 128, Article 129 provides power to the prosecutor and the police without them having to resort to an application for a warrant to access the data mentioned in this article. The aim of Article 129 is to empower the prosecutor or the police to acquire information about (a) a particular person when the police or the prosecutor is in possession of information on a specific telecommunications device or a point of access to a computer system; (b) a specific telecommunications device or point of access to a computer system where the police have information on the name of a particular person; or (c) whether a specific telecommunications device or point of access to a computer system is active or was active at a certain specified time and date. For example, under (a), the prosecutor may have information about a criminal offense that has been

perpetrated through the Internet, and specifically through a particular computer. Article 129 gives the prosecutor the power to order the service provider to provide the name of the person who is registered to that computer. Under (b), the prosecutor may have the name of a particular person and need access to information on his or her telephone number, for example.

With regard to telecommunications devices, such as telephones, the ability of the telecommunications service provider to provide relevant information to the police or the prosecutor may depend on the legislation in place in the state that applies to the service providers and that sets down their duties with regard to registering users. In some states, a person may not obtain a prepaid mobile phone without his or her name being registered upon the presentation of a valid form of identification. In other states, a prepaid mobile phone may be obtained without registration of the buyer's name. In the latter case, without a change to the telecommunications law, the service provider may not be in a position to provide the information.

Reference should be made to the commentary to Article 128 for the definition of *service provider* and *telecommunications*.

Paragraph 6: Usually the penalty for a failure to comply with an order of the prosecutor under Article 129 would be prescribed as an administrative offense under the telecommunications laws. Because there is no such element to the Model Codes, Paragraph 6 provides for such. Reference should be made to Article 295 on interlocutory appeals that provide a mechanism to appeal the trial judge's determination under Paragraph 6.

Article 130: Seizure of a Computer and Access to Computer Data

1. Where, during a search under Article 119, Article 120, Article 123, Article 124, Article 126, and Article 127, the police have reason to believe that a computer; a component of a computer; computer data stored on a computer or a component of a computer; or a computer data-storage medium in which computer data may be stored contains evidence relevant to the investigation of the criminal offense, the police may:
 - (a) seize or similarly secure the computer, a component of it, computer data stored on it, or a computer data-storage medium in which computer data may be stored;
 - (b) make and retain a copy of computer data;
 - (c) maintain the integrity of the relevant stored computer data; or
 - (d) render inaccessible or remove the computer data in the accessed computer.

2. The measures set out in Paragraph 1 must be conducted in a manner that minimizes the damage or the intrusion into the privacy of third parties also using the computer, a component of it, or a computer data-storage medium.
3. A warrant is required to examine and access the seized computer data, unless the judge has already authorized this in a search warrant issued under Articles 119 and 120, Articles 123 and 124, and Article 127.
4. Where an immediate danger exists that relevant data will be lost or modified, the police may examine and access seized computer data without a warrant. The police must promptly inform the prosecutor of any measures taken to access seized computer data. The prosecutor must then inform the competent judge of any measures taken by the police to access seized computer data. Where the competent judge concludes that the measure of the police was conducted in accordance with the MCCP, the judge must issue an order validating the measure without a warrant.
5. A search warrant or an order validating the examination of seized computer data under Paragraph 4 may include an order that an expert witness examine the seized computer, a component of it, or a computer data-storage medium in which computer data may be stored.

Commentary

Article 130 consists of two separate elements. The first relates to the power of the police in the course of a search to seize a computer, a component of it, computer data, or a computer data-storage medium; to make and retain a copy of any computer data; to maintain the integrity of stored computer data; and to render inaccessible or remove computer data in an accessed computer. The crux of this power is to preserve computer data pending a further warrant to access it, under Paragraph 3, or, pending a warrantless search, if justified, under Paragraph 4. The second element of Article 130 relates to accessing computer data once it has been preserved. Computer data may be accessed in two circumstances: where a warrant is obtained from a competent judge, and, under Paragraph 4, where there is an immediate danger that the data will be lost or modified. It is important to note that any access to computer data is not real-time interception of data of the sort found in Article 136; only stored computer data is accessed. It should also be noted that Article 130 refers to the seizure of a computer rather than a computer system. A *computer system* means any device or group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data (Article 1[a] of the Council of Europe Convention on Cybercrime).

Paragraph 1: The term *computer data*, according to Article 1(a) of the Council of Europe Convention on Cybercrime, means “any representation of facts, information or concepts in a form suitable for processing in a computer system, including a pro-

gram suitable to cause a computer system to perform a function.” A *data-storage medium* refers to a CD-ROM or a diskette.

Paragraph 3: Computer data is generally not considered tangible property and is therefore not covered by ordinary provisions on search and seizure. In order for a search to legally encompass the accessing of computer data (as opposed to its preservation, which is dealt with under Article 128), the judge must include a power in the warrant to search for the data, whether during the search of a dwelling or premises, a vehicle, or a person. Where an existing search warrant does not contain the power to search a computer to obtain computer data, a new warrant must be obtained that provides for this power.

Paragraph 4: Reference should be made to Article 115, which provides that evidence obtained through accessing data without a warrant (and that falls outside the exceptions provided for in Paragraph 4) is inadmissible at trial where validation from the judge is not obtained under Paragraph 4.

Examples of situations in which relevant data could be lost or modified, and thus where a search without a warrant may be justified under Paragraph 4, are where encrypted files are open on a computer or where an e-mail is open (i.e., not downloaded onto the computer) at the time of the search. If the files are not accessed in these cases, the information may be inaccessible in the future.

Paragraph 5: As with Article 128 on the preservation of stored computer data and the partial disclosure of traffic data, searching and seizing stored computer data are complex and require skilled and well-trained investigators. In accordance with Article 19 of the Council of Europe Convention on Cybercrime, Paragraph 5 provides that a person who has knowledge about the functioning of the computer system may be compelled to provide the information necessary to undertake an examination of the seized data. According to the *Explanatory Report*, this provision “addresses the practical problem that it may be difficult to access and identify the data sought as evidence, given the quantity of data that can be processed and stored, the deployment of security measures, as well as the nature of computer operations. It recognizes that system administrators, who have particular knowledge of the computer system, may need to be consulted concerning the technical modalities about how best the search should be conducted” (paragraph 200).

Where a judge decides to appoint an expert witness, the person must be appointed under Article 141. Reference should be made to Article 141 and its accompanying commentary.

Subsection 5: Production Order

Article 131: Production Order

1. A production order is an order that compels a third party to produce documents, records, or other objects in his or her possession before the court.
2. A production order may be granted where:
 - (a) probable cause exists that a criminal offense has been committed; and
 - (b) there are reasons to believe that documents, records, or other objects of a third party represent evidence relevant to the investigation of that criminal offense.
3. A motion for a production order may be filed by the prosecutor.
4. A motion for a production order must be submitted in writing to the competent trial court.
5. The motion for a production order must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person against whom the production order is sought;
 - (c) the particular criminal offense to which the motion relates;
 - (d) the reasons for believing that the document, record, or object is relevant to the investigation of the criminal offense; and
 - (e) a request that the competent judge issue a production order.
6. Where the requirements of Paragraph 2 are met, the competent judge may grant a production order.
7. The production order must contain the following:
 - (a) the name of the issuing court and the signature of the judge who issued the production order;
 - (b) the name and details of the person to whom the order is addressed and the title or rank of the person or persons authorized to execute the order;
 - (c) a description of the document(s), record(s), or object(s) that are the subject of the order;
 - (d) a direction as to when and where the document(s), record(s), or object(s) should be delivered;
 - (e) a warning that noncompliance with the order could result in a fine or in the detention of the person to whom the order is addressed, in accordance with Article 41 of the M CCP; and
 - (f) the expiration date of the order.

Commentary

Article 131 provides the court with the power, subject to a motion of the prosecutor to order a third party to produce records, documents, or objects relevant to the criminal investigation. The article is purposely broad so as to empower the court to require the production of a wide range of documents, records, or objects. That said, any document, object, or record that is subject to a production order (also known as a *subpoena* in some states) must be linked to an ongoing criminal investigation, and the party who has filed the motion must prove that a criminal offense has been committed and that there is reason to believe that the subject of the production order constitutes relevant evidence in the criminal investigation.

Production orders are usually used to compel banks or legal entities to produce evidence. Documents and records subject to a production order under Article 131 may be, for example, financial records, bank records, or commercial requirements. Article 12(6) of the United Nations Convention against Transnational Organized Crime and Article 31(7) of the United Nations Convention against Corruption require that a state party empower the courts to order the production of such records. According to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 147, paragraph 312), *financial records* include records of financial service companies other than banks. *Commercial records* mean real estate transactions and records of shipping lines, freight forwarders, and insurers. As discussed in the commentary to Article 128, a production order may also be a mechanism by which to require a service provider to provide the prosecutor with telecommunications traffic data. Reference should be made to the commentary to Article 128 for further discussion.

Subsection 6: Preservation and Seizure of Proceeds of Crime and Property Used in or Destined for Use in a Criminal Offense

Article 132: Expedient Preservation of Property and Freezing of Suspicious Transactions

1. A prosecutor may make an order to secure the expeditious preservation of property and freezing of suspicious transactions where:
 - (a) reasonable suspicion exists that the property to be preserved or the transaction to be frozen represents the proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense; and
 - (b) there is a significant risk that the property concerned will be concealed, destroyed, alienated, or in any other way made impossible to retrieve before a warrant, under Article 133, can be obtained from a judge.

2. An order to secure the expeditious preservation of property and the freezing of suspicious transactions temporarily prohibits a third party, such as a financial institution, from transferring, destroying, converting, disposing, or moving property that is the subject of the order.
3. The order of a prosecutor can be issued for up to a period of seventy-two hours. Within this time limit, the prosecutor must seek an order under Article 133. Where an order is not granted under Article 133, the order of the prosecutor ceases to have effect.
4. For the purposes of Article 132, *property* includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

Commentary

Article 132 provides an interim measure for a prosecutor to order a third party to preserve property or to freeze a certain suspicious transaction pending an application for seizure under Article 133. The interim preservation of property and freezing of transactions require a lower burden of proof than that of seizure. The requirement is that there is a “reasonable suspicion” that the property or transaction represents the proceeds of crime or property, equipment, or other instrumentalities that have been used in or are destined for use in a criminal offense. In addition, there must be a significant risk that the property concerned will be concealed, destroyed, or alienated before a warrant for seizure may be obtained under Article 133. Reference should be made to Article 1(40) for the definition of *reasonable suspicion*. Under Article 133, the higher standard of “probable cause” is used, in addition to the significant risk test under Article 133(3)(b) and a proportionality test under Article 133(3)(c). The order under Article 132 is finite in nature and ceases to apply after seventy-two hours, which gives the prosecutor enough time to apply for a seizure warrant but not so much time as to unduly restrict the property rights of a person without judicial authorization.

Paragraph 4: The definition of *property* in Article 132 is taken from Article 1(b) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The definition is similar to that contained in the United Nations Convention against Transnational Organized Crime (Article 1[d]) and the United Nations Convention against Corruption (Article 2[d]). The only distinction is the omission of the term “tangible or intangible.” The reason for this exclusion is that *tangible* (meaning property that is detectable with the senses, such as a painting or jewelry) and *intangible* (meaning property that cannot be detected with the senses, such as a claim to a bank account, a stock, or a bond) are subsumed within the terms “corporeal” or “incorporeal,” which have been previously defined in the Council of Europe’s definition of *property*.

Article 133: Temporary Seizure of Proceeds of Crime or Property Used in or Destined for Use in a Criminal Offense

1. A warrant is required for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense.
2. The temporary seizure of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense involves:
 - (a) the temporary prohibition of the transfer, destruction, conversion, disposition, or movement of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense; or
 - (b) the temporary assumption of custody or control of proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense on the basis of a warrant for temporary seizure.
3. An application for temporary seizure may be filed by the prosecutor with the registry of the competent trial court where:
 - (a) probable cause exists that the item or items sought to be seized represent the proceeds of crime, property, equipment, or other instrumentalities used in or destined for use in a criminal offense;
 - (b) there is a significant risk that proceeds of crime, property, equipment, or other instrumentalities will be concealed, destroyed, alienated, or in any other way made impossible or difficult to confiscate at the end of proceedings; and
 - (c) there are no less restrictive means to preserve the property in question.
4. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may encompass:
 - (a) property into which proceeds of crime have been transformed or converted;
 - (b) property acquired from legitimate sources, if proceeds of crime have been intermingled, in whole or in part, with such property, up to the assessed value of the intermingled proceeds; and
 - (c) income or other benefits derived from proceeds of crime, from property into which proceeds of crime have been transformed or converted, or from property with which proceeds of crime have been intermingled, up

to the assessed value of the intermingled proceeds, in the same manner and to the same extent as proceeds.

5. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may include an order to a third party, such as a financial institution, temporarily prohibiting it from transferring, destroying, converting, disposing, or moving property that is the subject of the warrant.
6. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may be granted for the period of time up until the judgment after trial is final.
7. Where a warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities is granted before the indictment has been confirmed under Article 201, the warrant is no longer valid where the investigation is discontinued under Article 98, or where the indictment is not confirmed.
8. Where, under Paragraph 7, a warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities is no longer valid, the property must be returned to the owner or possessor where it has been taken into custody or control. Where the warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities prohibited the transfer, destruction, conversion, disposition, or movement of property, all restrictions on dealing with the property must be lifted.
9. The application for the temporary seizure of the proceeds of crime, property, equipment, or other instrumentalities must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) a description and location of the proceeds of crime, property, equipment, or other instrumentalities that are the subject of the application and an estimation of their value;
 - (c) the particular measure sought by the prosecutor, whether it is the temporary prohibition on the transfer, destruction, conversion, disposition, or movement of property or the temporary assumption of custody or control of proceeds of crime, property, equipment, or other instrumentalities;
 - (d) if the measure sought is the temporary prohibition on the transfer, destruction, conversion, disposition, or movement of property, whether any orders against a third party, under Paragraph 5, are sought;
 - (e) the particular criminal offense or offenses that the application for temporary seizure relates to and the alleged perpetrator of the criminal offense or offenses;

- (f) a declaration that an investigation has been initiated by the prosecutor under Article 94 or that an indictment has been presented under Article 195;
 - (g) the facts that substantiate the probable cause that the proceeds of crime, property, equipment, or other instrumentalities in question constitute the proceeds of crime or property, equipment, or other instrumentalities used or destined for use in a criminal offense;
 - (h) the facts that substantiate the significant risk that proceeds of crime, property, equipment, or other instrumentalities will be concealed, destroyed, alienated, or in any other way made impossible or difficult to confiscate at the end of proceedings; and
 - (i) a request that the competent judge issue a warrant for the temporary seizure of the proceeds of crime, property, equipment, or other instrumentalities.
10. The competent judge may issue a warrant upon the consideration of the written application, where the criteria set out in Paragraph 3 are met.
11. The warrant must contain the following:
- (a) the name of the issuing court and the signature of the competent judge who issued the warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities;
 - (b) the name and particulars of the person to whom the warrant is addressed and the title or rank of the person or persons authorized to execute the warrant;
 - (c) a description and location of the proceeds of crime, property, equipment, or other instrumentalities that are the subject of the warrant and an estimation of their value;
 - (d) an order to prohibit the transfer, destruction, conversion, disposition, or movement of proceeds of crime, property, equipment, or other instrumentalities or an order to temporarily assume custody or control of proceeds of crime, property, equipment, or other instrumentalities;
 - (e) where relevant, an order to a third party to refrain from transferring, destroying, converting, disposing, or moving the property that is the subject of the warrant;
 - (f) a direction that the seized proceeds of crime, property, equipment, or other instrumentalities should be delivered to [insert location] without delay;
 - (g) the duration of the warrant; and

- (h) a declaration that, if the investigation is discontinued or if the indictment is not confirmed, the warrant is no longer valid and the proceeds of crime, property, equipment, or other instrumentalities must be returned to the owner or possessor.
- 12. A written and reasoned decision must be prepared by the competent judge within a reasonable period after issuing the warrant for the temporary seizure.
- 13. A copy of the warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities and the accompanying decision must be served upon the prosecutor, the suspect or the accused, and his or her counsel, in accordance with Article 29.
- 14. A warrant for the temporary seizure of proceeds of crime, property, equipment, or other instrumentalities may be appealed under Article 295.
- 15. For the purposes of Article 133:
 - (a) *proceeds of crime* means any economic advantage derived from or obtained directly or indirectly from a criminal offense or criminal offenses. It may consist of any property, as defined in Subparagraph (b); and
 - (b) *property* includes property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property.

Commentary

Seizure, as provided for in Article 133, is sometimes known as *freezing*. According to Article 2(f) of the United Nations Convention against Transnational Organized Crime, the seizing or freezing of the proceeds, assets, equipment, and other instrumentalities of crime is a legal measure under which a person is temporarily prohibited from transferring, converting, disposing of, or moving his or her property by order of the court. Seizure may be distinguished from *confiscation* or *forfeiture*, which involves the permanent deprivation of property by order of a court (see Article 2[g] of the United Nations Convention against Transnational Organized Crime). Confiscation is provided for in Articles 70–73 of the MCC. Reference should be made to Articles 70–73 of the MCC and their accompanying commentaries for further discussion. The United Nations Convention against Corruption (Article 31[1]) and the United Nations Convention against Transnational Organized Crime (Article 12[1]) both require that a confiscation regime be set in place for the confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense and for the confiscation of the proceeds of crime. Both conventions also require that a seizure or freezing regime be set in place (United Nations Convention against Corruption, Article 31[2] and United Nations Convention against Transnational Organized Crime,

Article 12[2]). Article 133 provides a mechanism for the seizure of property and other instrumentalities used in criminal acts.

Seizure, like confiscation, has been increasingly recognized—both in domestic law and in international conventions—as a valuable tool in the fight against serious crimes such as organized crime, money laundering, drug trafficking, and the financing of terrorism. A number of international conventions requires that states introduce legislation on seizure, including the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Article 5), the United Nations Convention against Transnational Organized Crime (Article 12), the United Nations Convention against Corruption (Article 31 and Chapter 5), and the International Convention for the Suppression of the Financing of Terrorism (Article 8). Seizure and confiscation are used to ensure that the perpetrators of serious criminal activity do not profit from their crime and that they do not enjoy their illegal gains. Taking away the “capital” of a criminal gang will also hinder the commission of future criminal activities by preventing the reinvestment of funds in criminal activity. According to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, “[c]riminalizing the conduct from which substantial illicit profits are made does not adequately punish or deter organized criminal groups. Even if arrested and convicted, some of these offenders will be able to enjoy their illegal gains for their personal use and for maintaining the operations of their criminal enterprises. Despite some sanctions, the perception would still remain that crime pays in such circumstances and that Governments have been ineffective in removing the means for continued activities of criminal groups. Practical measures to keep offenders from profiting from their crimes are necessary. One of the most important ways to do this is to ensure that States have strong confiscation regimes that provide for the identification, freezing, seizure and confiscation of illicitly acquired funds and property” (paragraphs 287–288).

It must be noted that the seizing and confiscating of assets and proceeds of crime amounts to an extraordinarily complicated challenge, with which even well-resourced states grapple. The Council of Europe’s *Combating Organized Crime: Best Practice Surveys of the Council of Europe* highlights the fact that “proceeds of crime only rarely fall into the lap of the courts or government like ripe fruit from the tree or vine. What is not investigated by financial intelligence or other personnel may never be learned about at all, for it is very difficult to reconstruct financial flows from crimes long after they have occurred, and harder still to get the money back. . . . Merely to pass laws . . . will not ipso facto lead to a substantial increase in recoveries from offenders or third parties. This extra recovery can happen only if unspent assets can be found, and can be attributed to the possession or control of someone against whom an order can be made” (page 64). In addition to resources, intensive training programs are required for those involved in the investigation of the proceeds of crime. It may be necessary to establish special units or teams to undertake the investigations. The teams may consist of actors from different sectors of the justice system and beyond, including prosecutors, police, and experts in forensic accounting.

As discussed in the commentary to Section 12 of the General Part of the MCC, still other changes to the legal framework in a post-conflict state will be required in order to ensure that seizure and confiscation measures can be implemented. First, the crimi-

nal procedure law must be amended to allow police and prosecutors to gain information on or trace the banking or other transactions of convicted persons and any money held in accounts with a bank as required by Article 12(6) of the United Nations Convention against Transnational Organized Crime and Article 31(7) of the United Nations Convention against Corruption. *Tracing* is a necessary part of confiscation or seizure. It refers to the process by which proceeds of crime are identified for later seizure or confiscation. Tracing requires that the prosecutor have the power to access bank and business records and to require that banks or businesses produce these records. This measure has been incorporated into Article 131 of the MCCP. Second, other changes to domestic banking laws may be required. The most elaborate and extensive provisions on the sorts of amendments required are contained in Article 52 of the United Nations Convention against Corruption and include a requirement that financial institutions verify the identity of customers, take reasonable steps to determine the identity of beneficial owners of funds deposited in high-value accounts, conduct enhanced scrutiny of certain accounts, and maintain adequate records of transactions. Third, it is necessary to regulate procedures for the handling of seized proceeds and property. Regulations should specify who is responsible for taking the seized property and holding it, where it should be held, and what will be done with it. The United Nations Convention against Corruption (Article 31[3]) and the United Nations Convention against Transnational Organized Crime (Article 14) specify that states parties should make provisions to regulate the administration and disposal of seized and confiscated property.

Paragraph 1: The *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (page 146) states that the term “destined for use in” is meant to signify an intention of such a nature that it may be viewed as tantamount to an attempt to commit a criminal offense.

Paragraph 2: The definition of *seizure* contained in Paragraph 2 is based on the definition contained in Article 2(f) of the United Nations Convention against Transnational Organized Crime and Article 2(f) of the United Nations Convention against Corruption.

Paragraph 3: In some states, when a judicial assessment is being made of whether proceeds or property should be seized, the burden of proof is shifted to the suspect to demonstrate the lawful origins of the proceeds or property. This is in contrast to the prosecutor being required to prove that the proceeds or property have an unlawful origin. This practice is not generally accepted around the world. Many experts are concerned that the practice violates the presumption of innocence that requires the prosecutor to bear the burden of proof in a criminal case. That being said, treaties such as the United Nations Convention against Corruption (Article 31[8]) and the United Nations Convention against Transnational Organized Crime (Article 12[7]) provide for this possibility. The drafters of the MCCP, in view of the controversy surrounding the shifting of the burden of proof, and in view of concerns about protecting the right to presumption of innocence of a suspect, decided not to include a reverse burden of proof in the MCCP.

Paragraph 4: This paragraph is based on Article 31(4)–(6) of the United Nations Convention against Corruption and Article 12(3)–(5) of the United Nations Convention against Transnational Organized Crime.

Paragraph 14: An appeal against a decision for temporary seizure may be filed under Article 295 by a suspect or an accused or by a prosecutor (where the decision of the court has been not to grant a warrant for temporary seizure requested by the prosecutor). An interlocutory appeal under Article 295 may also be filed by a third party; for example, a third party with a bona fide property or other interest in the proceeds or property seized. Most legal systems that allow the court to seize property provide for some mechanism for a third party to appeal the decision on the basis of that party's right to the property or to the money (that is seized as representing the proceeds of crime). Where seizure and confiscation are conducted under civil law, then the third-party appeal may also be under civil law. Under the MCC and the MCCP, because seizure and confiscation are addressed under criminal law, the third-party appeal is also afforded under the criminal law.

Paragraph 15(a): The definition contained in Paragraph 23(a) is taken from Article 1(a) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The United Nations Convention against Transnational Organized Crime (Article 1[e]) and the United Nations Convention against Corruption (Article 1[e]) also define “proceeds of crime,” although in a more narrow way. The definition in both United Nations conventions refers only to “property” derived from crime rather than “any economic advantage,” which is contained in the Council of Europe Convention. The Council of Europe definition and the MCCP definition both include property but go much further. The *Explanatory Report to the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism* states that “the definition of ‘proceeds’ was intended to be as broad as possible” (paragraph 21).

Paragraph 15(b): The definition of *property* in Paragraph 23(b) is taken from Article 1(b) of the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism. The definition is similar to that contained in Article 1(d) of the United Nations Convention against Transnational Organized Crime (Article 1[d]) and the United Nations Convention against Corruption. The only distinction is the omission of the term “tangible or intangible.” The reason for this exclusion is that “tangible” (meaning property that is detectable with the senses, such as a painting or jewelry) and “intangible” (meaning property that cannot be detected with the senses, such as a claim to a bank account, a stock, or a bond) are already subsumed within the terms “corporeal” and “incorporeal” that are found in the Council of Europe's definition of “property.”

Section 5: Covert or Other Technical Measures of Surveillance or Investigation

General Commentary

Criminal gangs are becoming increasingly sophisticated in the methods they employ. Consequently, the means used to investigate crime have also become more sophisticated. Advances in surveillance technology have been of great benefit to the investigation of organized crime, which often involves a closed group of individuals, making it immensely difficult to obtain testimony against ringleaders. International and regional conventions, including the United Nations Convention against Transnational Organized Crime, have urged states to incorporate special investigative techniques into domestic law to use in the course of the investigation of serious and complex crimes such as organized crime, weapons trafficking, trafficking in persons, and smuggling in persons. The Council of Europe Convention on Cybercrime requires states parties to implement technical measures of investigation such as the real-time interception of content data associated with specified computer communications and the real-time collection of traffic data associated with specified telecommunications. In post-conflict states such as Kosovo, given the problems that organized crime created and the lack of legislation authorizing covert surveillance, the United Nations Mission in Kosovo implemented UNMIK Regulation 2002/6 on Covert and Technical Measures of Surveillance.

Section 5 incorporates covert and other technical measures of surveillance and investigation into the MCCP in order to give the police and prosecutors the tools necessary to investigate serious crimes. Because of the highly intrusive nature of these measures, the need to investigate crime must be balanced with the right to privacy of a suspect, an accused, or other persons. The right to privacy is protected under Article 12 of the Universal Declaration of Human Rights, Article 17 of the International Covenant on Civil and Political Rights, Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article IX of the American Declaration of the Rights and Duties of Man, and Article 11 of the American Convention on Human Rights. The right to privacy encompasses the right to privacy of family, home, and correspondence.

Thus, a delicate balancing act is required, which is why Section 5 was one of the most complex and contentious provisions to draft. Many human rights advocates were opposed to its inclusion in the MCCP, while many other experts were concerned that its omission would hinder the prosecution of the sorts of serious crimes that are endemic in post-conflict societies. The drafters of the MCCP worked with both policing officials and human rights experts in the drafting and vetting of Section 5. In-depth and substantive research was undertaken on similar legislation from around the world. In addition, significant research was undertaken on the human rights dimension of covert surveillance. The European Court of Human Rights is the only human rights body that has dealt with the issue of covert surveillance in detail; its jurisprudence provided significant guidance on the procedural counterbalances necessary to ensure the conformity of covert or other technical measures of surveillance or investi-

gation with international human rights law. The case law of the European Court of Human Rights was studied and deconstructed and then integrated into Section 5 to ensure that all the standards evinced by the court in the sphere of covert surveillance were adequately included (see *Klass v. Germany*, application no. 5029/71 [1978] ECHR 4 [September 6, 1978]; *Malone v. United Kingdom*, application no. 8691/79 [1984] ECHR 10 [August 2, 1984]; *Halford v. United Kingdom*, application no. 20605/92 [1997] ECHR 32 [June 25, 1997]; *Huvig v. France*, application no. 11105/84 [1990] ECHR 9 [April 24, 1990]; *Kruslin v. France*, application no. 11801/85 [1990] ECHR 10 [April 24, 1990]; *Valenzuela Contreras v. Spain*, application no. 27671/95 [1998] ECHR 70 [July 30, 1998]; *PG and JH v. United Kingdom*, application no. 44787/98 [2001] ECHR 550 [September 25, 2001]; *Taylor-Sabori v. United Kingdom*, application no. 47114/99 [2002] ECHR 691 [October 22, 2001]; *Khan v. United Kingdom*, application no. 35394/97 [2000] ECHR 195 [May 12, 2000]; *Govell v. United Kingdom*, application no. 27237/95 [1997] EHRLR 438 [January 14, 1998]; *Ludi v. Switzerland*, application no. 12433/86 [1992] ECHR 50 [June 15, 1992]; *Teixeira de Castro v. Portugal*, application no. 25829/94 [1998] ECHR 52 [June 9, 1998]; *Radermacher and Pferrer v. Germany*, application no. 12811/87 ECHR 34 [May 13, 1991]; *Shahzad v. United Kingdom* [1998] EHRLR 210 [October 22, 1997]; and *X v. United Kingdom*, application no. 7215/75).

The European Court has held that interference with privacy by reason of covert measures may be necessary but must be proportionate. Perhaps more important, interference with privacy must be accompanied by sufficient procedural safeguards as to its conduct and authorization to ensure that the interference is not arbitrary, unpredictable, or uncontrolled. According to the European Court, covert surveillance measures must be provided for by a law that must be accessible to the public and is precise. The law must indicate the permissible covert surveillance techniques that may be used, the category of persons against whom the techniques may be used, the duration of time for which covert surveillance techniques may be undertaken, and the circumstances under which information gathered may be kept on file. In addition, proper methods of independent accountability must exist in relation to the authorization and use of surveillance and its review and supervision. Finally, covert surveillance measures should be used only in relation to serious crimes. (Because the MCC does not contain a full catalog of crimes but generally focuses on the most serious crimes that occur in a post-conflict state, Section 5 does not specify a list of criminal offenses to which it applies. However, Article 136[2] limits the application of surveillance in private premises and the interception of telecommunications content data to offenses carrying a potential penalty of more than five years, given the extremely intrusive nature of these measures. In ordinary domestic provisions on covert surveillance, such a list should be included.)

The use of covert surveillance is in many respects a great advance in criminal investigation. Covert surveillance is, however, an expensive endeavor, and a state should consider carefully whether it has sufficient resources to buy and maintain the necessary equipment. Not only is recording equipment expensive, so too is the media to store recorded conversations, the equipment to duplicate conversations, and the cost of transcription. The use of such measures requires highly trained personnel, including undercover agents, who require special training and whose activities may require additional money. In Kosovo, despite the introduction into law of sophisti-

cated covert surveillance measures, many of these measures have never been implemented because police have neither the training nor the expensive equipment necessary to undertake the measures.

Article 134: General Provisions on Covert or Other Technical Measures of Surveillance or Investigation

1. Covert or other technical measures of surveillance or investigation are the following:
 - (a) *interception of telecommunications content data*, which involves covert interception, access to, monitoring, collection, or recording of the content of communications between persons conducted through telephone, computer networks, or other forms of telecommunications and information technology;
 - (b) *real-time collection of telecommunications traffic data*, which involves obtaining, monitoring, or recording traffic data, including the location data that indicates the origin, destination, route, time, date, size, duration, or type of a communication conducted through telephone, computer networks, or other forms of telecommunications and information technology or type of underlying service;
 - (c) *surveillance in private premises*, which involves covert monitoring, recording, or transcribing of conversations, persons, their movements, or their other activities in private premises or dwellings;
 - (d) *monitoring and recording of private conversations*, which involves covert monitoring, recording, or transcribing of conversations conducted in public or publicly accessible or open spaces, or conversations in which at least one party of the conversation consents to such measure;
 - (e) *targeted observation*, which involves covert monitoring, observation, or recording of persons, their movements, or their other activities in public, publicly accessible, or open spaces; it may include the use of tracking and positioning devices for monitoring the movement of targeted persons or objects;
 - (f) *monitoring of financial transactions and disclosure of financial data*, which involves monitoring of financial transactions conducted through a bank or another financial or business institution, or obtaining information on

deposits, accounts, or transactions kept by such institutions without the consent or the knowledge of the person under investigation;

- (g) *search of letters, packages, containers, and parcels*, which involves inspection, by physical or technical means, of letters, packages, containers, and parcels without the consent or the knowledge of the person under investigation;
 - (h) *controlled delivery*, which involves the technique of allowing illicit or suspect consignments to pass out of, through, or into the territory of one or more states, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of a criminal offense and the identification of persons involved in the commission of the offense;
 - (i) *deployment of undercover agents*;
 - (j) *regulatory purchase of an item*; and
 - (k) *a simulation of a corruption offense*.
2. Except as otherwise provided for in Article 135, a warrant is required for covert or other technical measures or surveillance or investigation.

Commentary

Article 134 sets out a number of different sorts of covert or other technical measures of surveillance. It is worth noting that these surveillance or investigative measures are similar to the methods used by military and civilian intelligence agencies, but their purpose is different. The purpose of Section 5 is not simply to gather data about a person in general but to gather data specific to a criminal investigation (and under the supervision of a judge). The surveillance measures listed in Article 134 were compiled through comparative research on domestic legislation and from conventions such as the Council of Europe Convention on Cybercrime.

The term *content data*, used in Article 134, refers to the actual content of a communication, for example, an e-mail or the contents of a phone call as described under Paragraph 1(a). The term *real-time* used in Paragraph 1(b) means the interception of the data is taking place at the same time the data is being transmitted. The opposite to real-time collection of data is the collection of stored data, which is provided for under Article 130. The term *traffic data* used in Paragraph 1(b), according to Article 1(d) of the Council of Europe Convention on Cybercrime, means “any computer data relating to a communication by means of a computer system, generated by a computer system that formed a part in the chain of communication, indicating the communication’s origin, destination, route, time, date, size, duration, or type of underlying service.”

Article 135: Covert or Other Technical Measures of Surveillance or Investigation without a Warrant in Exigent Circumstances

1. The police do not require a warrant to:
 - (a) open or seize any letter, package, container, or parcel where there is probable cause that an immediate danger to the safety and security of persons exists; or
 - (b) detain a letter, package, container, or parcel where there is probable cause that it contains objects, the possession of which in itself constitutes a criminal offense, or objects that are related to a criminal offense.
2. The police can start implementing the measures set out in Article 134(1)(b), (d), (e), (f), (g), (i), (j), and (k) without a warrant and upon the authorization of a prosecutor where:
 - (a) the warrant cannot be obtained in time and a substantial risk of delay exists that could result in the loss of evidence or an immediate danger to the safety and security of persons or that evidence relevant to the investigation will be tampered with, removed, or destroyed before a search warrant could be obtained from a judge; and
 - (b) the conditions set out in Article 136(1)(a)–(d) have been met.
3. Within twenty-four hours of the prosecutor authorizing the measure without a warrant under Paragraph 2, he or she must send a report to the competent trial court and request a warrant under Article 136, or the prosecutor's authorization becomes null and void.
4. Upon receiving the report under Paragraph 3, the competent judge must determine whether the conditions under Paragraph 2 have been met. Where the competent judge concludes that the covert or other technical measures of surveillance or investigation were conducted in accordance with Paragraph 2, the judge must issue an order validating the prosecutor's authorization and a warrant under Article 136.

Commentary

As a general rule, a warrant is required for all the measures contained in Section 5, although there are some exceptions for exigent circumstances. Under Paragraph 1, the police may open, seize, or detain a letter, package, parcel, or container where the conditions of Paragraph 1(a) or 1(b) are met. The police require the prosecutor's authorization to undertake the measures set out in Paragraph 2. The prosecutor then needs to seek the ex post facto validation of the court under Paragraph 4. Where no order was received from the prosecutor by the police as required by Paragraph 2 or where the validation of the judge was not obtained under Paragraph 4, the evidence obtained by the police will be inadmissible at trial. Reference should be made to Article 115 on exclusion of evidence obtained without a warrant or without validation of the prosecutor or the judge, as required under the MCCP.

Article 136: Covert or Other Technical Measures of Surveillance or Investigation under a Warrant

1. A warrant for the covert or other technical measures of surveillance or investigation may be applied for by a prosecutor where:
 - (a) in the case of measures under Article 134(1)(a)–(h), probable cause exists that the suspect has committed or attempted to commit a criminal offense; or
 - (b) in the case of measures under Article 134(1)(i)–(k), a probable cause exists that the person is involved in criminal activities relating to a criminal offense; and
 - (c) the application of the measure is necessary and proportionate given all the circumstances of the case, including the importance of the information or evidence to be obtained and the gravity of the criminal offense; and
 - (d) the information that could be obtained by the measure is unlikely to be obtained by any other less intrusive investigative measure without unreasonable difficulty or potential danger to the safety and security of persons.
2. The measure of surveillance in private premises under Article 134(1)(c) may be ordered only in relation to the investigation of criminal offenses for which a penalty of more than five years can be pronounced, and the measure of interception of telecommunications content data under Article 134(1)(a) may

be ordered only in relation to the investigation of criminal offenses for which a penalty of more than five years can be pronounced.

3. The measures contained in Article 134(1)(a), (b), (f), (g), and (h) may be ordered against:
 - (a) a suspect;
 - (b) a person who is suspected of receiving or transmitting communications, letters, packages, containers, or parcels originating from or intended for the suspect or a person who is participating in or conducting financial transactions for the suspect. This is subject to the provisions of Article 244 on privileged communications between a lawyer and his or her client; or
 - (c) a person whose telephone, telecommunications device, or point of access to a computer system the suspect is suspected of using. This is subject to the provisions of Article 244 on privileged communications between a lawyer and his or her client.
4. The measure contained in Article 134(1)(e) may be ordered against:
 - (a) a suspect; or
 - (b) a person other than the suspect, where probable cause exists that monitoring the other person will lead to the discovery of the location of a suspect who has fled and is evading arrest and detention.
5. The measures contained in Article 134(1)(c), (d), (i), (j), and (k) may be ordered only against a suspect.
6. The application for covert or other technical measures of surveillance or investigation must be in writing and must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name or identification of the person against whom the warrant is sought;
 - (c) the criminal offense, or offenses, in connection with which the warrant is being sought;
 - (d) the type of covert or other technical measure of surveillance or investigation that is sought by the applicant;
 - (e) in relation to measures under Article 134(1)(a)–(h), the facts that substantiate the probable cause that the suspect has committed or has attempted to commit a criminal offense;
 - (f) in relation to the measures under Article 134(1)(i)–(k), the facts that substantiate the probable cause that the person is involved in criminal activities relating to a criminal offense;

- (g) in relation to the measures under Article 134(1)(c), whether the applicant requests authorization for a police officer to enter private premises to activate or disable the technical means for the execution of the measure; and
 - (h) a request that the competent judge issue a warrant for covert or other technical measures of surveillance or observation.
- 7. Where the requirements of Paragraph 1 are met, the competent judge may issue a warrant for covert or other technical measures of surveillance or observation.
- 8. The warrant must specify:
 - (a) the name or identification of the person against whom the warrant is ordered;
 - (b) the particular measure of covert or other technical measures of surveillance or observation that has been approved by the competent judge;
 - (c) where applicable, the address on postal items, the elements for the identification of each telephone or point of access to a computer network, or the suspect's bank account number;
 - (d) where a warrant for the measure under Article 134(1)(c) is granted by the competent judge, whether a designated police officer is authorized to enter private premises to activate or disable the technical means for the execution of the measure;
 - (e) where a warrant requires the assistance of a telecommunications provider or a financial institution for its implementation, a warning that non-compliance with the warrant may result in the commission of the criminal offense of "failure to respect an order of the court" under Article 197 of the MCC or a fine or term of imprisonment under Article 41 of the MCCP for noncompliance with a court order;
 - (f) the person or persons authorized to implement the measure and the persons responsible for supervising the execution of the warrant;
 - (g) the dates on which written reports must be submitted to the competent judge and the prosecutor; and
 - (h) the length of time for which the warrant is valid.
- 9. A warrant for covert or other technical measures of surveillance or investigation must not exceed sixty days from the date of the issuance of the warrant, except as provided for in Article 139.

Commentary

The criteria for granting covert surveillance measures vary depending on the measure being sought. The measure being sought also affects whom the measure may be ordered against (see Paragraphs 3–5). There is no oral mechanism to obtain a warrant for covert or other technical measures of surveillance or investigation; the competent judge may consider only a written application (Paragraph 6). If the judge grants a warrant, Paragraph 9 provides a time limit for the warrant as required in the jurisprudence of the European Court of Human Rights, subject only to limited extensions under Article 139 that must be sought upon application of the prosecutor.

Where covert or other technical measures of surveillance or investigation are carried out without a warrant under Article 136, any evidence obtained in the execution of such a measure is inadmissible at trial. Reference should be made to Article 115 and its accompanying commentary.

Paragraph 2: International human rights case law on covert surveillance provides guidance on the safeguards that should be included in legislation on covert surveillance in order to ensure that it complies with the right to privacy of the person against whom any such measure is directed. One of the safeguards is that covert surveillance measures should be used only in the case of serious crimes. Because the MCCP does not contain a full catalogue of criminal offenses and, for the most part, contains serious criminal offenses, the provisions of Section 5 apply generally to all offenses. Paragraph 2 provides a slight exception in the case of surveillance of the content data of telecommunications and surveillance in private premises. Both of these measures are highly intrusive and should be used only in relation to criminal offenses carrying a penalty of more than five years' imprisonment. Under the MCC, the penalty ranges provided for criminal offenses are as follows: 1–5 years, 2–10 years, 3–15 years, and 5–20 years. Thus, covert and other technical measures of surveillance and investigation may not be employed with regard to any offense that carries a potential penalty of 1–5, 2–10, 3–15 or 5–20 years' imprisonment.

Paragraph 3(b): International human rights law provides that communications between a suspect and an accused and his or her lawyer that fall under the category of privileged communications may not be made the subject of a warrant for covert or other technical measures of surveillance or investigation. This is why Paragraph 3(b) is subject to the exception to Article 244.

Paragraph 8(e): Usually the penalty for a failure to comply with an order under Article 136 would be prescribed as an administrative offense under the telecommunications laws. Because there is no such element to the Model Codes package, reference is instead made to Article 41 of the MCCP on “noncompliance with a court order.” Reference should also be made to the commentary to Article 41, which explains the scope of this provision and the differences between it and the criminal offense of “failure to respect an order of the court” under Article 197 of the MCC.

Article 137: Execution of Covert or Other Technical Measures of Surveillance or Investigation

1. The police must commence the execution of the warrant no later than fifteen days after it has been issued.
2. The execution of measures of covert or other technical measures of surveillance or investigation must be carried out in such a way as to minimize the intrusion into the privacy of persons not subject to the measure.
3. Where a warrant under Article 134(1)(c) is being executed and where the warrant has authorized a designated police officer to enter private premises, his or her actions in the private premises must be limited to those specified in the warrant.
4. Periodic written reports and other relevant information on the implementation of a warrant must be sent to the prosecutor by the police:
 - (a) at monthly intervals in the case of a measure under Article 134(1)(i); and
 - (b) at weekly intervals in the case of all other covert or other technical measures of surveillance or investigation.
5. The police implementing covert or other technical measures of surveillance or investigation must make a record of the time and date of the beginning and end and nature of each action taken in implementing the warrant. These records must be annexed to the periodic report under Paragraph 4 and to the final report under Paragraph 12.
6. Where the prosecutor does not receive written reports at the required intervals under Paragraph 4, he or she may:
 - (a) suspend the warrant until such time as a written report is sent to him or her by the police; or
 - (b) terminate the warrant.
7. Telecommunications service providers and financial institutions must assist the police in the implementation of warrant for covert or other technical measures of surveillance or investigation and are prohibited from disclosing this fact and any details about the warrant to the suspect, another person subject to the warrant, or a third party. Where a telecommunications service provider discloses information in contravention of the warrant or where the telecommunications provider otherwise fails to comply with the warrant, it may be

liable for the criminal offense of “failure to respect an order of the court” under Article 197 of the MCC or a fine or term of imprisonment under Article 41 of the MCCP for noncompliance with a court order.

8. Upon a written application of the prosecutor, the competent judge may modify the warrant at any time if he or she determines that modification is necessary to ensure that all preconditions of the warrant are satisfied.
9. Where, in the course of the execution of a warrant for covert or other technical measures of surveillance of investigation, any of the conditions under Article 136(1) cease to exist, the execution of the measure must be immediately terminated. In such a case, the police must immediately notify the prosecutor and the prosecutor must notify the competent judge in writing.
10. Upon the completion of the execution of a warrant for covert or other technical measures of surveillance or investigation, the police must deliver all recordings, messages, photographs, and other items obtained through the use of covert or other technical means of surveillance, together with a report comprising a summary of the evidence gathered, to the prosecutor.
11. Letters, packages, containers, and parcels that do not contain information that will assist in the investigation of a criminal offense or that do not contain objects that must be seized under the applicable law must be immediately forwarded to the addressee or returned to the sender.
12. A written report must be sent to the competent judge by the prosecutor when the warrant has been fully executed or has expired.

Commentary

Once the judge has granted a warrant, his or her role in relation to the covert or other technical measures of surveillance or investigation is not over. The drafters of the MCCP decided to legislate for a strong oversight role for the judge that grants the warrant for covert or other technical measures of surveillance, as required under international human rights law.

Paragraph 7 requires that telecommunications service providers assist the police in the implementation of a warrant for covert or other technical measures of surveillance or investigation without disclosing details about the warrant to any person. This obligation is usually contained in a telecommunications law but, because it may be absent, it has been included in the MCCP.

Paragraph 7: Reference should be made to the commentary to Article 136(8)(e) for a discussion on the consequences of noncompliance with a court order for covert or other technical measures of surveillance or investigation.

Article 138: Prohibition of Provocation (Entrapment)

1. In the implementation of covert or other technical measures of surveillance or investigation, and in particular in the execution of a warrant under Article 134(1)(i)–(k), the undercover police officer, or a person acting under the direction and supervision of the police in implementing the measure, must not provoke criminal activity by inciting a person to commit a criminal offense that the person would not have committed but for the intervention of the police officer or the persons acting under his or her direction.
2. Where criminal activity has been provoked, the suspect must not be prosecuted for or convicted of the criminal offense that resulted from the provocation.

Commentary

Entrapment involves a situation where a person is induced to commit a criminal offense by deception or undue persuasion where the person would not have otherwise committed the criminal offense. The central element of entrapment is that the person would not have committed the criminal offense “but for” the intervention of the police. In the case of the use of undercover agents, regulatory purchases of items such as drugs, or simulated corruption offenses, Article 138 requires that the police do not incite a person to commit a criminal offense. A person who is unlawfully “entrapped” may not be prosecuted for the criminal offense alleged.

Article 139: Extension of a Warrant for Covert or Other Technical Measures of Surveillance or Investigation

Upon a written application of the prosecutor, the competent judge may issue a further extension of sixty days at a time and up to a total period of:

- (a) four months for the measure under Article 134(1)(c);
- (b) two years for the measure under Article 134(1)(e) ;
- (c) three years for the measure under Article 134(1)(i); or

- (d) one year for all other measures of covert or other technical measures of surveillance or investigation under Article 134(1).

Article 140: Destruction of Unused Materials from Covert or Other Technical Measures of Surveillance or Investigation

1. Where the prosecutor decides not to file an indictment against the suspect who has been subject to the covert or other technical measures of surveillance or investigation, he or she must inform the competent judge in writing of this decision.
2. The competent judge must, upon receipt of the decision of the prosecutor not to file an indictment or upon the expiration of two years after the end of execution of the warrant for covert or other technical measures of surveillance or investigation, issue a decision:
 - (a) ordering that the materials gathered be destroyed under the supervision of the competent judge; and
 - (b) setting an official date for their destruction.
3. Prior to the official date for the destruction of the materials gathered in the execution of measures of covert or other technical measures of surveillance or investigation, the competent judge must inform the person against whom the warrant was issued of the use of the measures against him or her.
4. The competent judge may at the request of the prosecutor decide not to inform the person of the measures of covert or other technical measures of surveillance or investigation against him or her, or to deny him or her the inspection of all or part of the material, if:
 - (a) there are strong reasons to believe that the inspection of the obtained material could constitute a serious risk to the lives or security of a particular person; or
 - (b) persons or where the inspection would endanger an ongoing investigation.
5. Where a person is informed that covert or other technical measures of surveillance or investigation have been ordered against him or her, he or she has the right to inspect the material collected.

6. The competent judge must give written notice to the prosecutor, the police, and the person who was subject to the measure of covert or other technical measures of surveillance or investigation (if the person has been informed that covert or other technical measures of surveillance or investigation have been ordered against him or her under Paragraph 3) thirty days before the destruction of materials gathered in the execution of the measure.
7. The competent judge, or a person authorized by the judge, must be present at the destruction of the materials and must produce an official note for the case file on the destruction.

Commentary

Where no indictment is filed by the prosecutor against the person who was subject to the warrant, the competent judge must be informed (Paragraph 1). Because of the nature of the materials gathered and the fact that they were not used in criminal proceedings, it is important that they not be retained by the authorities but instead be destroyed. Paragraph 2 places the onus on the judge to ensure the destruction of all materials related to the covert or other technical measures of surveillance or investigation, either upon notification by the prosecutor under Paragraph 1 or upon the expiration of two years after the end of the execution of the warrant (Paragraph 2). Best practice in surveillance legislation requires that the target of the surveillance has the right to be informed of the invasion of his or her right to privacy. The only permissible exception under the M CCP is where doing so would constitute a serious risk to the lives or security of persons or where it would endanger an ongoing investigation (Paragraph 4). Where the person who was subject to surveillance or investigation is informed under Paragraph 3, Paragraph 5 provides that he or she is entitled to examine the materials gathered. The judge must later oversee the destruction of the materials (Paragraphs 6 and 7) and must provide notice to the prosecutor and the person who was subject to surveillance or investigation (where he or she was informed of the measures in the first place).

Section 6: Expert Witnesses

Article 141: Expert Witnesses

1. Expert witnesses are engaged when the determination or assessment of an important fact calls for the finding and opinion of a specialist possessing the necessary professional knowledge.

2. Chapter 11, Part 5, Section 2 on witnesses and witness testimony applies, with the necessary modifications, to expert witnesses, except as otherwise provided for in Article 141.
3. The prosecutor and the defense may make a motion to the court for an expert analysis.
4. The court may order expert analysis on its own motion.
5. Before appointing an expert or experts under Paragraph 6, the court must invite the prosecutor and the defense to state their views on the expert or experts chosen. If the parties agree on an expert, the expert must be used provided that he or she is found suitable and that there are no impediments to the appointment, such as under Paragraph 8. Where the parties do not agree on the expert or experts chosen, the court has the final determination on the matter.
6. The court may designate one or more experts to conduct the expert analysis.
7. The court may entrust the expert analysis to a professional institution or a public entity that may then designate one or more expert witnesses to provide the expert analysis.
8. A person may not serve as an expert witness where he or she:
 - (a) is a victim of the criminal offense;
 - (b) is a relation or the extramarital partner of the defense counsel, the victim or the counsel for the victim, or the accused;
 - (c) has taken part in the proceedings as a prosecutor, defense counsel, or counsel for the victim;
 - (d) has been examined as a witness; or
 - (e) where other circumstances exist that cast substantial doubt on his or her impartiality.
9. The prosecutor or the defense may challenge the impartiality of an expert witness at any stage by filing a motion with the trial court to disqualify the expert witness. Where the trial court does not disqualify the expert witness, the party whose motion was refused may challenge the impartiality of an expert witness by submitting a written request for disqualification, along with a written statement of facts substantiating the request, to the president of the courts through the registry of the appeals court.
10. The president of the courts must determine whether to grant the request on the basis of the written statement of facts.

11. A decision of the president of the courts taken under Paragraph 10 may be challenged by the prosecutor or the defense by way of interlocutory appeal under Article 295.
12. Except for persons who in their official capacity are obliged to assist as experts, no person is required to act as an expert unless he or she voluntarily undertakes to do so. However, a person who has voluntarily undertaken to act as an expert witness may not later avoid its performance without a valid excuse.
13. An expert witness is entitled to an honorarium for preparing the expert analysis, for the costs accrued in the execution of his or her duties, and for expenditure of his or her efforts and time in an amount found reasonable by the court. When the analysis has been submitted by professional institution or public entity under Paragraph 7, compensation must be paid to an individual expert only to the extent special provisions so prescribe.
14. The order of the court for expert analysis must specify the facts to be established or assessed by an expert analysis as well as the persons to whom the expert analysis must be entrusted.
15. The court may grant an expert:
 - (a) access to relevant evidence;
 - (b) permission to examine particular persons in accordance with Articles 142 and 144; or
 - (c) permission to conduct an on-site inspection.
16. Unless the court prescribes otherwise, an expert witness must submit a written analysis. The court must direct the expert to submit the analysis within a fixed period.
17. After the written analysis is filed with the court, it must be served upon the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27.
18. An expert who has submitted a written analysis may also be examined orally during the confirmation hearing or the trial on the request of the prosecution or the defense or the court's own motion. When the expert analysis is entrusted to an institution or public entity, the institution or public entity must designate a person to be examined orally if requested by the prosecution, the defense, or the court.
19. Prior to oral examination, an expert witness must take the following oath: "I [name] promise and affirm on my honor and conscience that I will perform the expert task assigned to me to the best of my ability."

20. The court may on its own motion or on the application of the prosecutor or the defense order that a new analysis be rendered by the same or by other experts if he or she considers the analysis insufficient.

Commentary

The role of experts in criminal proceedings varies from state to state. In some systems, each side calls its own expert witnesses. Each expert witness is therefore aligned with a particular party, either the prosecution or the defense, and provides evidence before the court on their behalf. In other legal systems, an expert witness is appointed by the court and acts in the capacity of a “friend of the court.” The expert is aligned with neither the prosecution nor the defense and is responsible for giving an impartial and objective expert analysis to the court. The latter option was chosen by the drafters of the MCCP. The reason for this is because in a post-conflict state it may be quite difficult to obtain the services of an expert witness in certain instances. It may also be the case that a suspect or accused person does not have the means to pay for an expert witness in the same way that the prosecution service may. To ensure equality for both parties (discussed in the commentary to Article 62), the drafters of the MCCP thought it preferable that a single expert witness be appointed by the court. This is not to say that either party is precluded from engaging its own expert. The parties are free to prepare and submit their own “expert opinions” in writing to the court and to the other parties; such opinions, however, cannot serve as “best evidence.” They can be used, nevertheless, to challenge the credibility or qualification of the court-appointed experts.

Reference should be made to Articles 32–35, which regulate the summons of expert witnesses and the consequences of noncompliance with a court summons.

As with all investigative measures, in accordance with Article 112(5), an expert witness may be appointed by the court at any stage of the proceedings.

Paragraph 13: The payment of expert witnesses requires special regulation by the court system to limit the possibility of the arbitrary determination of honoraria. This may be done by the president of the courts by way of a “judicial circular” or another method as appropriate under the applicable law.

Paragraph 15: The reference to “on-site inspection” in this paragraph refers, for example, to a crime scene.

Section 7: Forensic Investigative Measures

Article 142: Physical Examination of a Suspect or an Accused

1. A physical examination involves the examination of the exterior or interior of the human body and the taking of samples from the human body and includes the:
 - (a) examination of the exterior or interior of the human body of the person;
 - (b) taking of hair and follicle samples from the person;
 - (c) taking of saliva and urine samples;
 - (d) taking of nasal swabs;
 - (e) taking of swabs of the skin surface, including the groin area and under-fingernail samples;
 - (f) taking of fingernail samples;
 - (g) taking of cell tissues for the purpose of establishing identity; or
 - (h) taking of blood samples.
2. Except as otherwise provided for in Paragraph 3, a warrant is required for the physical examination of a person.
3. A warrant is not required:
 - (a) where a person consents to the physical examination; or
 - (b) for the measures listed in Paragraph 1(a)–(f) where there is an imminent risk of loss, tainting, or destruction of evidence if the physical examination is not conducted immediately and prior to the authorization of a judge.
4. Where a physical examination without a warrant is conducted by the police, the police must promptly submit the record of the search to the prosecutor, who must submit the record to the competent judge.
5. The competent judge must determine whether the conditions under Paragraph 3 were met. Where the competent judge concludes that the physical examination without a warrant was conducted in accordance with Paragraph 3, the judge must issue an order validating the physical examination without a warrant.

6. A warrant for a physical examination of a suspect or an accused may be granted:
 - (a) if the examination is necessary to determine facts important to the investigation of the criminal offense; or
 - (b) where it has been established that specific evidence of a criminal offense may be found on or in the body; and
 - (c) where the physical examination will not be detrimental to the health of the person of whom it is sought.
7. The prosecutor or the police, prior to sending the crime report to the prosecutor under Article 92, may make an application for a physical examination.
8. An application for a physical examination may be submitted orally or in writing to the competent trial court.
9. An oral application for a physical examination may be submitted when there is a risk that the delay inherent in submitting a written warrant would jeopardize the investigation.
10. An oral application for a physical examination may be communicated to the competent judge by telephone, radio, or other means of electronic communication.
11. Where an oral application for a warrant for a physical examination is made, the competent judge is responsible for taking notes on the communication between the judge and the prosecutor or the police in relation to the warrant and for placing the notes in the court file within twenty-four hours. The written notes and the warrant for a physical examination must be signed by the competent judge.
12. Where an oral application for a physical examination is made, the applicant (either the police or the prosecutor) must draft a warrant and read it verbatim to the competent judge.
13. Where a written application for a physical examination is made, the application must contain:
 - (a) the name of the competent court and the title of the applicant;
 - (b) the name of the person against whom the warrant for a physical examination is sought;
 - (c) the particular criminal offense that he or she is suspected of;
 - (d) the facts that indicate that the search is necessary to find evidence of the criminal offense that may be found in or on the body;

- (e) the particular type of physical examination set out in Paragraph 1 that is sought; and
 - (f) a request that the competent judge issue a warrant for a physical examination.
- 14. Where the requirements of Paragraph 6 are met, the competent judge may make an order for a physical examination.
- 15. A physical examination must not cause a risk to the health of the person on whom it is being carried out.
- 16. A physical examination under Paragraph 1(a), where the examination is of the interior of the human body, and under Paragraph 1(d), (e), (g), and (h) must be conducted by a doctor, nurse, or medical professional under circumstances allowing for maximum privacy and with full respect for the dignity of the person.
- 17. A record of the physical examination must be made and must include:
 - (a) the name of the person was subject to the physical examination;
 - (b) the name of the person who conducted the physical examination;
 - (c) the name of any other persons who were present during the physical examination;
 - (d) the nature of the physical examination;
 - (e) the findings of the physical examination; and
 - (f) a list of samples taken during the physical examination.
- 18. The suspect or the accused who was physically examined must be given a record of the physical examination.
- 19. All samples taken during a physical examination must be preserved and stored so as to preserve their integrity.
- 20. In accordance with Article 101, the prosecutor is responsible for ensuring that the samples are either preserved or stored to preserve their integrity or that they are forwarded for DNA analysis under Article 143.
- 21. Cells taken from a person under Paragraph 1(g) and blood samples taken from a person under Paragraph 1(h) may be used only for the purposes of the criminal investigation for which they are taken or in other pending criminal proceedings. They must be destroyed without delay as soon as they are no longer required for these uses.

Commentary

As discussed in the commentary to Article 122, a physical examination is a more intrusive form of examination than a search of a person, covering the interior and exterior of a person's body, including the taking of blood and other samples. As with a search of a person under Articles 122–125, a physical examination penetrates the right to privacy of an individual, although even more intrusively. Article 142 balances the right to privacy of an individual with the need to conduct an effective criminal investigation by incorporating a range of procedural safeguards.

A physical examination may involve taking samples of hair and follicles, fingernails, saliva, urine, skin cells from the nose or from the skin surface, cell tissues, and blood. Because these measures are so intrusive and because they result in the police taking a person's biometric data, the incidences in which samples may be taken from a person by way of physical examination are limited. The police may not take cell tissues or blood without a warrant. Other samples may be taken by the police without a warrant only where there is "an imminent risk of loss, tainting, or destruction of evidence if the physical examination is not conducted immediately and prior to the authorization of a judge" (Paragraph 3). Any physical examination that is conducted pursuant to Paragraph 3 without later judicial authorization being obtained is not valid until it has been approved by a judge under Paragraph 5. Where the physical examination is not approved of by a judge after it has been undertaken, any evidence obtained must be excluded from the trial as provided for in Article 115. In addition (and in cases where the police have not undertaken a physical examination without a warrant under Paragraph 3), when any of the measures listed in Paragraph 1 are undertaken without a warrant, all evidence obtained through the measure are not admissible at trial in accordance with Article 115.

Certain measures provided for under Paragraph 1, because of their delicate nature and the necessity for medical expertise in undertaking them, must not be undertaken by police officers. Paragraph 16 requires that interior examinations of the body, nasal swabs, skin swabs, the taking of cell tissues, and the taking of blood samples be done only by a person with medical expertise. The police may take fingernail samples under Paragraph 1(f), hair and follicle samples under Paragraph 1(b), and saliva and urine samples under Paragraph 1(c).

Any samples taken must be stored properly (Paragraph 19), which will require proper facilities and equipment and qualified personnel. Once the samples have been taken, the next step is to apply to the court for them to be analyzed. This requires another warrant and is dealt with under Article 143. Because a physical examination results in the extraction of biometric data from a person, this data needs to be handled correctly. Usually a special law is required to address how personal data, such as biometric data, is dealt with. A comprehensive regulation of how biometric data should be treated is beyond the scope of the MCCP.

Paragraph 15: When a physical examination is being carried out under a warrant from the court, it is important that the execution of the warrant not cause a risk to the person's health. It is also important that the intervention not violate other rights of the suspect, such as the right to bodily integrity and the right to freedom from torture and cruel, inhuman, or degrading treatment (protected under Article 58). In interpreting what the latter right means, in relation to the taking of physical evidence from a person by police, international and regional human rights bodies have held that an act may be classified as "inhuman" where it causes either actual bodily injury or intense mental or physical suffering (see *Labita v. Italy* [European Court of Human Rights], application no. 2677/95, paragraph 120). Treatment may be termed "degrading" where it arouses feelings of fear, anguish, and inferiority capable of humiliating and debasing a person (*Hurtado v. Switzerland* [European Court of Human Rights], application no. 1754/90). In order for treatment to be classified as inhuman or degrading, it must go beyond the inevitable element of suffering or humiliation that would be connected with a legitimate form of treatment, such as a physical examination under warrant (*Labita v. Italy*, paragraph 120). Likewise, with the right to bodily integrity, where a court has granted a warrant for a physical examination such as the taking of blood, international and regional human rights courts have recognized that, to obtain blood or other material that is the subject of a warrant, it is necessary for the suspect to endure a minor interference with his or her physical integrity. However, if a physical examination goes beyond what might be seen as a minor interference with the physical integrity of a person, it may constitute a breach of the person's right to bodily integrity.

Where a person does not cooperate with the police or the medical personnel carrying out the warrant for a physical examination, the examination may still be undertaken in defiance of the person's will (see *Jalloh v. Germany*, application no. 54810/00). On its own, this does not constitute a breach of the person's right to freedom from cruel, inhuman, or degrading treatment or his or her right to bodily integrity. Nor does it constitute a risk to the person's health. The question is whether the treatment causes either actual bodily injury or intense mental suffering and whether the degree of suffering goes beyond the inevitable suffering or humiliation that would normally accompany such an intervention. The European Court of Human Rights, in *Jalloh v. Germany* (paragraph 76), stated that "any interference with a person's physical integrity carried out with the aim of obtaining evidence must be the subject of rigorous scrutiny, with the following factors being of particular importance: the extent to which forcible medical intervention was necessary to obtain the evidence, the health risks for the suspect, the manner in which the procedure was carried out and the physical pain and mental suffering it caused, the degree of medical supervision available and the effects on the suspect's health."

If a physical examination was carried out in a manner that violates the right of a person to freedom from torture or cruel, inhuman, or degrading treatment, it must be excluded from evidence in court under Articles 230 and 232.

Article 143: DNA Analysis of Samples Taken during a Physical Examination or of Other Materials

1. A warrant is required for DNA analysis of samples taken during a physical examination or on any other materials that have been found or seized.
2. An application for DNA analysis of samples or other materials may be filed by the prosecutor where such measures are necessary to:
 - (a) establish identity; or
 - (b) establish whether certain trace substances originate from the suspect, the accused, or the victim of a criminal offense.
3. Where the requirements of Paragraph 2 are met, the competent judge may make a warrant for DNA analysis of samples.
4. DNA analysis must be conducted by a specialized institution appointed by the competent judge in accordance with Article 141.
5. Cell tissue that has been collected under Article 142 may be used only to identify DNA code. No other information may be ascertained during the examination of cell tissue.
6. The specialized institution that conducts the DNA analysis must submit a written analysis to the competent judge who ordered the measure, unless the warrant specifies otherwise.
7. Cell tissue must be destroyed without delay once the judgment becomes final.
8. The prosecutor, the suspect or the accused, and his or her counsel must be served with a copy of the report of the specialized institution in accordance with Article 27.

Commentary

A person's unique DNA code may be extracted from various sources, such as blood, saliva, and hair. The purpose of seeking DNA analysis in general, and specifically under Article 143, is to compare the DNA code of a suspect (which may be extracted from the samples taken under Article 142) with another biological specimen to see if they match. For example, the DNA code of a suspect, found through testing a sample of his or her blood, may be compared with the DNA code extracted from blood found

at a crime scene to determine if they are identical or not. A warrant must be obtained under Article 142 before such DNA cross-matching can be performed. Once the judge determines that sufficient grounds exist to grant a warrant under Paragraph 2, the judge must appoint a specialized institution to undertake the analysis and report back its findings. The specialized institution falls under the category of an expert witness as provided for in Article 141. Thus, the specialized institution is not acting for one of the parties but is a “friend of the court” and is tasked with providing an objective analysis and reporting it back to the court. Reference should be made to Article 141 on expert witnesses.

In many post-conflict states, even before the conflict, there will not have been the legal basis, or indeed the resources and facilities, to undertake forensic investigations and DNA analysis. In the post-conflict era, there may not be forensic laboratories equipped to undertake such analysis. In post-conflict Kosovo, DNA analysis, because of a lack of domestic capacity and facilities, was undertaken in Germany. In implementing a provision on DNA analysis, a post-conflict state should ensure that it has the domestic resources and facilities to undertake such analysis. Otherwise, it will need to consider making provisions and securing an adequate budget for DNA testing to be undertaken in another country.

Article 144: Examination of the Mental State of a Suspect or an Accused

1. An order is required for the examination of the mental state of the suspect or an accused.
2. A motion for the examination of the mental state of the suspect or the accused may be filed by the prosecutor or the defense alleging that the suspect or the accused person was mentally incompetent at the time of committing the criminal offense as defined in Article 23 of the MCC.
3. Upon receiving the motion for the examination of the mental state of the suspect or an accused, the competent judge must order the examination of the mental state of the suspect or an accused.
4. The examination of the mental state of the suspect or the accused must be carried out by a psychiatrist with experience in forensic psychiatry. Where no psychiatrist is available, the examination must be carried out by a psychologist with experience in forensic psychology. The psychiatrist or psychologist must be appointed by the judge in accordance with Article 141.
5. The psychiatrist or the psychologist who conducts the examination of the mental state of the suspect or the accused must submit a written analysis to

the competent judge who ordered the measure, unless the warrant specifies otherwise.

6. The prosecutor and the defense must be served with a copy of the report of the psychiatrist or the psychologist in accordance with Article 27.

Commentary

Both the prosecutor and the defense may make an application to determine the mental competency of the suspect or the accused at the time of the alleged criminal offense. Article 144 differs from Article 89, Mental Incapacity of the Suspect or the Accused, in two fundamental ways. First, the order under Article 144 relates to determining the mental competency of the suspect or the accused at the time the offense was committed, which will help determine whether the suspect or the accused may be excused from criminal responsibility under Article 23 of the MCC that provides for a defense of mental incompetence. On the other hand, Article 97 addresses the issue of whether the accused is presently mentally capable of standing trial and does not address the accused's capacity at the time of the criminal offense. Second, the implications of an examination of the mental state of the suspect or the accused under Articles 97 and 144 are different. Under Article 144, the results of the examination of the mental competency of the suspect or the accused are used as evidence at trial. The question of whether the suspect or the accused was mentally incompetent at the time of allegedly committing the criminal offense will not have an effect on the progress of the investigation or trial. In contrast, under Article 97, if the judge orders a competency report and finds at the hearing that the suspect or accused person is mentally incompetent, the trial may be suspended or indefinitely postponed.

The investigative measure under Article 144 is crucial in cases where the accused alleges that he or she was mentally incompetent at the time of the criminal offense. It is important that a trained psychiatrist or psychologist with experience in forensic psychiatry or psychology (i.e., psychiatry or psychology applied to the law) undertake the examination of the person's mental state. In many post-conflict states, however, there is a severe lack of trained psychiatrists or psychologists to undertake competency evaluations. In some post-conflict states, a solution has been to bring forensic psychologists or psychiatrists from other states to conduct competency evaluation reports, although this is an expensive option.

Article 145: Autopsy and Exhumation

1. A warrant is required for an autopsy or exhumation of a body.
2. An application may be filed by the prosecutor for an autopsy, where there is probable cause that a death was caused by a criminal offense or connected

with the commission of a criminal offense. If the body has been buried, the prosecutor may file a motion for the exhumation of the body with the aim of viewing the body and performing an autopsy.

3. The prosecutor must automatically submit an application for an autopsy where the deceased died in the custody of the police whether at a detention center or away from a detention center. The police or the detention authority must inform the prosecutor of all deaths in custody.
4. The competent judge must appoint a forensic pathologist to conduct the autopsy in accordance with Article 141 on the appointment of expert witnesses. Where no forensic pathologist is available, the competent judge must appoint a doctor, preferably with experience in forensic medicine, to conduct the autopsy.
5. The competent judge may order that toxicological tests be conducted by an institution that specializes in toxicological tests.
6. If the whereabouts of the family of the deceased person is known, the family must be notified of the date of the autopsy and may appoint a doctor or other medical professional to be present at the autopsy.
7. The forensic pathologist or doctor must perform the autopsy and must make professional observations regarding:
 - (a) the identification of the deceased person;
 - (b) the probable cause of the death of the deceased person;
 - (c) any sorts of injuries found on the corpse, whether the injuries were self-sustained or were caused by someone else and what probable means caused the injuries;
 - (d) any biological material, including blood, saliva, semen, or urine, found on the body of the deceased person;
 - (e) any substances identified through toxicological testing;
 - (f) the probable time of death; and
 - (g) the circumstances under which the death occurred, including an opinion as to whether the death occurred from natural causes, accident, suicide, unlawful killing, or unknown causes.
8. The forensic pathologist or doctor conducting the autopsy must pay attention to any biological material, including blood, saliva, semen, or urine, and must preserve it for possible DNA analysis if ordered under Article 143.
9. The forensic pathologist or doctor who conducts the autopsy must submit a written analysis to the competent judge who ordered the measure, unless the order specifies otherwise.

10. The forensic pathologist must not make any conclusion relating to the criminal responsibility of any suspect or any other individual in his or her written analysis.
11. The written analysis may include photographs taken by the forensic pathologist or under his or her supervision and may include exhibits, diagrams, or any other record that he or she deems appropriate.
12. Where a person is suspected or accused of a criminal offense in connection with the death of the person whose body was exhumed or subject to an autopsy, a copy of the report must be served upon the suspect or the accused.

Commentary

An *autopsy*, or postmortem examination, involves the medical examination of a human body to decipher the cause of the person's death or any injury or disease that the person may have had. An autopsy may be conducted for many reasons; Article 145 is concerned with *forensic autopsies*, that is, autopsies that are potentially connected with a criminal offense. An autopsy is always conducted by a forensic pathologist. The term *forensic pathologist* is defined in Article 1(21). A forensic pathologist is a doctor with expertise in forensic pathology, which is a branch of medicine that is associated with the study of changes to the human body caused by disease or injury, including changes caused by criminal behavior. A forensic pathologist will examine a body both externally and internally for structural alterations, will sometimes X-ray a body, and will conduct tests on samples removed from the body in a forensic laboratory to determine the possible cause of death. The forensic pathologist will produce a report that identifies the potential cause or manner of death, how death may have come about, and whether any preexisting contributing factors contributed to the cause of death.

An *exhumation* involves digging up a body that has already been buried. The purpose of an exhumation is to conduct an autopsy on the body to determine the cause of death. An exhumation may be conducted for a number of different reasons; the MCCP is concerned only with an exhumation connected with the alleged commission of a criminal offense.

The prosecutor may apply for an autopsy and/or an exhumation on the basis of probable cause that death was caused by or connected with a criminal offense (Paragraph 2). Under the MCCP, a prosecutor is obliged to apply for a warrant for an autopsy where a person has died at a detention center or in police custody. The MCCP also obligates the police and the detention authority to inform the prosecution service of the death of someone in their custody. The rationale behind this requirement is to make sure that torture or other mistreatment by the police did not contribute to the death. If there is any evidence of a criminal offense committed by the police, the prosecution service will be obliged to investigate the matter.

Ideally, a forensic pathologist should conduct the autopsy. This is standard practice. However, in many post-conflict states, there are no forensic pathologists nor are there forensic laboratories, which is why the MCCP specifies that as a second resort, a

doctor may conduct an autopsy. Even if a doctor has undertaken the autopsy, a person with the necessary expertise to undertake toxicological tests or other tests on any samples will be required, as will laboratory facilities. Realizing the importance of forensic laboratories to investigative techniques such as autopsies or physical examinations, international donors have invested in building, staffing, and refurbishing new laboratories in post-conflict states such as Liberia.

Paragraph 6 provides that if the whereabouts of the family of the deceased person is known, they may appoint a doctor or other medical professional to be present during the autopsy. This provision has been taken from the United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions; Principle 16 states that “[t]he family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy.” Upon completing the autopsy and any other tests on specimens arising from it, the forensic pathologist or doctor must make his or her professional observations in accordance with Paragraph 7 and set them out in a detailed report (Paragraph 9). Copies of the autopsy report must be served upon the suspect or the accused (Paragraph 12). At trial, the forensic pathologist or doctor may be required to testify as an expert witness, as provided for in Article 141 on expert witnesses. With regard to autopsies conducted in relation to a potential extra-legal, arbitrary, or summary execution, the criminal justice actors and the forensic pathologist or doctor should be aware of the United Nations Model Protocol for a Legal Investigation of Extra-Legal, Arbitrary and Summary Executions (the “Minnesota Protocol”). A more general protocol on autopsies, the Model Autopsy Protocol, has also been drafted, as has a Model Protocol for Disinterment and Analysis of Skeletal Remains. All these model protocols are contained in the *United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. The manual also contains an annex on “Postmortem Detection of Torture and Drawings of Parts of the Human Body for Identification of Torture.”

Paragraph 3: According to Principle 34 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, whenever a death in custody occurs, it must be investigated. One crucial element of any such investigation is an autopsy of the body. Given the importance of determining the cause of death, Paragraph 3 requires that the prosecutor automatically apply for an autopsy when a person dies in custody, whether in police custody or in a detention center or whether a person was away from the detention center or the police station but was still in custody.

Section 8: Unique Investigative Opportunity**Article 146: Unique Investigative Opportunity**

1. An order is required to undertake a unique investigative opportunity.
2. A unique investigative opportunity involves the taking of evidence from a witness or expert witness for the purpose of preserving the evidence, where the witness or expert witness will not be available to testify during the trial.
3. A motion for a unique investigative opportunity may be filed by the prosecutor or the defense with the registry of the competent trial court where:
 - (a) there is a unique opportunity to obtain important evidence from a witness or an expert witness; and
 - (b) there is a significant risk that the evidence may not subsequently be available at trial.
4. Where the requirements of Paragraph 3 are met, the competent judge must schedule a time and date for the taking of evidence.
5. The prosecutor, the suspect or the accused, and the witness or expert witness must be summonsed to appear at the hearing on the date and at the time specified in the summons. The summons must be served in accordance with Article 27.
6. The competent judge must take such measures as may be necessary to ensure the efficiency and integrity of the proceedings and, in particular, to protect the rights of the witness and the suspect or the accused.
7. The taking of evidence before the competent judge must be conducted in accordance with Chapter 11, Part 5, Section 4 of the M CCP.

Commentary

Both the prosecutor and the defense may apply for an order for a unique investigative opportunity. Under the M CCP, live testimony during the trial is preferable to prerecorded evidence or prior statements. This is because the trial process established under the M CCP is premised on the orality principle, where the evidence is introduced only at trial and the judge or panel of judges will not have had access to it in advance. Article 146 is one exception to this general principle. Under Article 146, evidence cannot be

taken where the other party (either the defense or the prosecution) has not been given an opportunity to fully examine the witness. From the perspective of the suspect or the accused, this requirement is vital in order to protect his or her right to examine a witness before him or her (see Article 64 and its accompanying commentary). In a unique investigative event, a judge should be present during the taking of evidence. This taking of evidence is akin to the mechanism by which the witness would have been questioned during the trial, except it occurs at a different time. The same rules apply to a unique investigative opportunity as apply to the questioning of a witness during the trial. When the trial is conducted later, the transcript of the evidence provided during the unique investigative opportunity will be entered into evidence by the party who requested it, and this evidence will be considered by the judge or panel of judges when determining the criminal responsibility of the accused.

An example of a situation in which a unique investigative opportunity may be appropriate is where a witness is gravely ill and may not be alive at the time of the trial to testify.

Part 4: Witness Protection, Witness Anonymity, and Cooperative Witnesses

Section 1: Protective Measures for Witnesses under Threat and Vulnerable Witnesses

General Commentary

The importance of adequately protecting witnesses in criminal proceedings has been increasingly realized in recent years both domestically and internationally. At the international level, the need for witness protection is recognized in Article 24 of the United Nations Convention against Transnational Organized Crime and Article 32 of the United Nations Convention against Corruption. In post-conflict states such as Kosovo and Bosnia and Herzegovina, legislation was introduced to allow for witness protection in light of the significant threats to witnesses testifying in criminal cases.

Witnesses may include victims, innocent bystanders, or individuals who have been involved in criminal activity but who are cooperating with the police. Witnesses may need to be protected because (a) their security or that of their family is at risk because they are a witness in a particular case (i.e., a *witness under threat* or an *intimidated witness*); or (b) the witness—usually a victim-witness—would be traumatized by testifying in open court and confronting the accused person (i.e., a *vulnerable witness*).

Turning to witnesses under threat first, protecting such witnesses is very important. A witness under threat should be protected in order to protect his or her life and safety and that of his or her family. From another perspective, if the witness is not protected, the intimidation of the witness may prevent the crime from being reported or, where it is reported, may stop the witness from giving full and frank testimony. This is a particular risk in serious crimes cases like organized crime. A witness under threat may be protected in different ways according to the gravity of the threat against him or her and according to the particular stage of the proceedings. At any early juncture in the proceedings, the police may decide to place a witness under threat under basic police protection, sometimes known as *close protection*. For a full discussion on the meaning and scope of close protection, reference should be made to Colette Rausch, *Combating Serious Crimes in Postconflict Societies* (pages 106–11). Close protection is purely a matter of police law and procedure and does not fall within the ambit of criminal procedure law, and therefore is not covered in the MCCP.

The second means of protecting a witness under threat falls under criminal procedure law and is contained in Part 4, Sections 1 and 2: witness protection procedural measures. These measures are the subject of Subsection 1 and Subsection 2 and are discussed in further detail below; they consist of “witness protection measures” and

“witness anonymity.” Witness protection measures apply both prior to and during a trial.

The third method of protecting a witness under threat is through witness protection programs. Witness protection programs are aimed at protecting witnesses in the case of serious intimidation and where other protective measures are not sufficient to protect the witness (and where the witness is sufficiently important to the proceedings to merit being placed in a witness protection program). Witness protection programs, in some instances, may be geared toward ensuring the long-term safety of a witness and his or her family. A witness and his or her family may be granted a visa to live in another state and may be given new identities, jobs, and other assistance to build a life elsewhere. Witness relocation programs are generally regulated either by a special law or as part of police laws and procedures rather than through a criminal procedure code. For a fuller discussion on witness protection programs, reference should be made to Rausch, *Combating Serious Crimes in Postconflict Societies* (pages 60–61).

Vulnerable witnesses may not need the same level of protection as witnesses under threat; for example, a vulnerable witness may not need close protection or to be part of a witness protection program. The form of protection provided to a vulnerable witness will vary from that provided to a witness under threat. Protection measures will be aimed more at lessening the trauma experienced by the vulnerable witness at all stages of the proceedings from the initial interview through to the witness testifying before the court. With regard to testifying before the court, as provided for in Article 147, a protective measure may be granted, for example, to ensure the absence of the accused person during the witness’s testimony. A witness protection order may also allow the vulnerable witness to testify behind a shield or in a location other than the courtroom under Article 147.

Article 24 of the United Nations Convention against Transnational Organized Crime and Article 32 of the United Nations Convention against Corruption recognize that in providing for witness protection, it is imperative to take account of the rights of a suspect or an accused person, because witness protection measures may impinge upon such fundamental rights as the right to examine or to have examined witnesses against him or her (Article 64) and the right to have adequate time and facilities to prepare a defense (Article 61). In drafting the provisions in the MCCP, careful attention was paid to ensuring that the rights of the accused are adequately balanced with the rights of the witness to protection and the need to use witness protection measures in the investigation of crime. Research was carried out on relevant international standards and human rights jurisprudence relating to witness protection, which was then integrated into the witness protection provisions to ensure that the need to protect the witness under threat or the vulnerable witness and the needs of the criminal investigation are carefully balanced with the rights of the suspect or the accused.

Witness protection measures, while usually granted during an investigation, may be granted at any stage of the proceedings.

As a complement to Sections 1 and 2 of Part 4 of Chapter 8, a number of criminal offenses have been included in the Model Criminal Code so as to penalize those who interfere in any way with a witness in a trial or who violate a court order for protective measures. The relevant offenses contained in the MCC are “obstruction of justice of a witness” (Article 193) and “revealing the sealed order for protective measures or ano-

nymity” (Article 200). The former offense criminalizes the use of force or intimidation against a witness, whereas the latter makes it a criminal offense to reveal the name of a witness who is subject to protective measures or witness anonymity where the court has ordered otherwise.

A post-conflict state considering introducing witness protection measures should carefully consider the financial implications of doing so. Some measures such as redaction of the names of witnesses from the public record (Article 147[a]) have minimal cost implications. Others, such as the use of voice-altering devices (Article 147[e][ii]), are quite costly. A post-conflict state must ensure that it has the monetary means to implement and sustain such measures in advance of introducing them into law.

Article 147: Protective Measures

A competent judge may order one or more of the following protective measures:

- (a) expunging from the public record any names, addresses, workplaces, profession, or any other data or information that could be used to identify a witness;
- (b) the prohibition on counsel for the suspect or the accused not to reveal the identity of the witness or disclose any materials or information that may reveal the identity of a witness;
- (c) the nondisclosure of any records that identify the witness, until such time as the competent judge decides otherwise or until a reasonable time before the trial, whichever occurs first;
- (d) the assignment of a pseudonym to a witness, where the full name of the witness is revealed to the defense within a reasonable period prior to trial;
- (e) efforts to conceal the features or physical description of the witness giving testimony, including testifying:
 - (i) behind an opaque shield;
 - (ii) through image- or voice-altering devices;
 - (iii) through contemporaneous examination in another place communicated to the courtroom by means of closed-circuit television; or
 - (iv) through a videotaped examination of the witness prior to the hearing but only where counsel for the accused is present and can examine the witness; or
- (f) the temporary removal of the accused from the courtroom if a witness refuses to give testimony in the presence of the accused or if the circum-

stances indicate that the witness will not speak the truth in the presence of the accused. In this case, counsel for the accused may remain in the courtroom and may question the witness.

Commentary

Article 147 lists a range of protective measures that may be ordered in favor of a witness under threat or a “vulnerable witness.” This list is exhaustive rather than illustrative and was compiled after comparative research on witness protection legislation and jurisprudence at both international and domestic levels.

The party that is petitioning for an order for protective measures may request any one of these measures or a combination of them. The expungement of the name of a witness from the public record under Subparagraph (a) aims to keep the identity of the witness secret from the general public (including the press). Subparagraph (a) places a duty on the court and the registry to ensure that no details about the witness are made public. Subparagraph (b) places a direct duty not to disclose on the counsel for the accused. This duty prevents counsel from making disclosure to the public, the suspect, and the accused person. Where this obligation is broken, counsel may be liable for a criminal offense under Article 200 of the MCC or Article 41 of the M CCP. Under Subparagraphs (c) and (d), neither the accused person nor his or her counsel will be aware of the identity of a witness until a “reasonable time prior to the trial.” This is a more severe measure than presented in Subparagraph (a) or (b) and provides a temporary form of anonymity. Under this measure, the judge must reveal the identity of the witness early enough to ensure the right of the accused to adequately prepare his or her defense (as provided for under Article 61) and to examine or have examined the witnesses (as provided for under Article 64). What constitutes a “reasonable time” will be a matter for the competent judge to decide and will often depend upon the complexity of the case. In the context of international tribunals, such as the International Criminal Tribunal for Rwanda, the practice has been to provide information on the identity of a witness within a period of twenty-one to sixty days prior to the commencement of trial. While the identity of the witness must be revealed to the defense prior to trial under Subparagraph (c), the judge may decide to withhold it from the public altogether. Where a person is granted a pseudonym under Subparagraph (d), the public will not be aware of the true identity of the witness even during the trial. The witness will be referred to as “Witness X,” for example, and all documentation will refer to the witness in this manner.

The protective measures provided for in Subparagraphs (e) and (f) all center around the appearance of the witness during the trial in open court. Where the voice or physical features of a witness are altered under Subparagraph (e), the defense will be aware of the identity of the witness but the public will not. Subparagraph (e) provides a range of options for the witness to testify in a concealed manner in the courtroom, testify live from another location, or testify in advance of the trial and have the video played at trial. With regard to the latter option, Subparagraph (e) provides that counsel for the accused must be present when the video is made. This proviso is made to ensure that the defense has the opportunity to properly examine the witness as required under Article 64. The measure provided for under Subparagraph (f) is an exception to the

right of the accused to be present during the trial and is justified on the basis of the needs of the witness as balanced against the rights of the accused. In order to lessen the impingement upon the rights of the accused, Subparagraph (f) requires that counsel for the accused must be present during the questioning of the witness to safeguard his or her rights.

Article 148: Grounds for Seeking an Order for Protective Measures

1. A protective measure may be granted by the competent judge to protect:
 - (a) a “witness under threat,” meaning a witness whose personal security or the security of his or her family member is endangered through the participation of the witness in criminal proceedings, as a result of threats, intimidation, or similar actions relating to his or her testimony; or
 - (b) a “vulnerable witness” meaning:
 - (i) a witness who has been severely physically or mentally traumatized by the commission of the criminal offense;
 - (ii) a witness who suffers from a serious mental condition rendering him or her unusually sensitive; or
 - (iii) a child witness.
2. For the purposes of Paragraph 1(a), “family member” means a spouse, a brother, a sister, a parent, a child, a grandparent, a grandchild, an adopted parent or adopted child, and a foster parent or child.

Commentary

Paragraph 2: The definition of family member is narrower than that of “relative” in Article 1(41) and includes only immediate family members who may be endangered by testifying at trial. The reason for a more narrow definition is that a protective measure is an exceptional measure that impacts on the rights of the suspect or accused. Therefore, the drafters wanted to allow for adequate protection of a person and his or her close family but not expand the scope of this measure too much. Paragraph 2 refers to “adopted parent” and “adopted child.” In some legal systems, it is not possible to “adopt” a child, in the sense that the child will take the name of the adoptive parents. Different terminology is used to describe a relationship that is akin to adoption but where the child maintains his or her family name. In a state that does not recognize adoption, the definition of family member used in domestic legislation should include any relationships that operate similarly to it.

Article 149: Procedure for Seeking an Order for Protective Measures

1. All protective measures must be applied for by way of written motion.
2. At any stage in the proceedings, the prosecutor, the defense, or a witness may file a written motion for protective measures with the registry of the competent trial court.
3. The motion must contain:
 - (a) the name of the competent trial court to which the motion is being submitted;
 - (b) the name of the party filing the motion;
 - (c) the identity of the proposed witness under threat or the proposed vulnerable witness;
 - (d) information concerning the criminal proceedings in which the proposed witness under threat or vulnerable witness is to testify, including the name of the suspect or the accused and the criminal offense of which he or she is suspected or accused;
 - (e) information relating to the evidence the proposed witness under threat or vulnerable witness will provide at the trial of the criminal offense;
 - (f) a description of the factual circumstances that substantiate the need to declare the witness to be a witness under threat or vulnerable witness and to afford protective measures in his or her favor; and
 - (g) the particular protective measures, or combination of measures, sought to protect the proposed witness under threat or vulnerable witness and a request to the competent judge to grant the measures sought.
4. The motion must be submitted to the registry of the competent trial court in a sealed envelope clearly indicating on the outside that it is a motion for protective measures.
5. The registry must forward the sealed motion immediately to the competent judge.
6. Only the competent judge and the prosecutor may have access to the sealed contents of the envelope submitted by the applicant.

Commentary

Article 149 sets out the procedure under which a motion for protective measures should be submitted to the court. All motions must be submitted in writing to the court.

Paragraph 4: Paragraph 4 ensures that no details relating to the potential witness under threat or vulnerable witness are revealed unnecessarily. This is particularly important where the motion requests that the identity of the witness be kept confidential as provided for under Article 147(a)–(d). The motion should be filed in a sealed envelope that should not be opened by the court staff member who receives it. Instead, it should be transmitted immediately to a competent judge who can open it and deal with it. The registry should not be privy to any information concerning the contents of the motion.

Article 150: Granting of an Order for Protective Measures without a Hearing

1. Upon receipt of the motion for a protective measure under Article 147(f), the competent judge may make an order for this protective measure without conducting a hearing.
2. The order for protective measures under Article 147(f) must be accompanied by a written and reasoned decision that must be released within a reasonable time after the order is made.

Commentary

When determining whether to grant an order for a protective measure under Article 147(f), the competent judge has two options: either the judge can rely solely on the written information provided in the motion submitted by the prosecutor, the defense, or the witness, or he or she can schedule a hearing under Article 151 to gather more information in advance of making his or her decision. Where the judge deems that he or she has sufficient information to grant the order for protective measures under Article 147(f), he or she can simply issue the order and later issue a written and reasoned decision. Where a judge is unsure about whether to grant an order for protective measures or where he or she wishes to gather more information, he or she must schedule a hearing.

Article 151: Granting of an Order for Protective Measures after a Hearing

1. Except as provided for in Article 150, upon receipt of the written motion, the competent judge must schedule a date and time for a closed protective measures hearing to request further information from the prosecutor, the defense, and the potential witness under threat or vulnerable witness.
2. Where the motion for protective measures has been submitted by the defense, the defense, the prosecutor, and the potential witness under threat or vulnerable witness must be informed of the date and time of the hearing under a sealed notice of a protective measures hearing in accordance with Article 27. The prosecutor must be present at the protective measures hearing.
3. Where the motion for protective measures has been submitted by the prosecutor or a potential witness under threat or vulnerable witness, the prosecutor and the witness must be informed of the date and time of the hearing under a sealed notice of a protective measures hearing in accordance with Article 27. The defense may not be present at a hearing of a motion for protective measures filed by the prosecutor or a potential witness under threat or vulnerable witness.
4. The protective measures hearing must be held in closed session and may include only the prosecutor, the defense, where applicable, the witness in question, and essential court and prosecution personnel.
5. Where a witness is examined at the protective measures hearing, he or she must make a solemn declaration under Article 247, 248, or 249. The competent judge must issue the warning set out in Article 235. The competent judge must inform the witness of his or her right to be free from self-incrimination under Article 251.
6. The competent judge may grant a protective measures order where:
 - (a) the judge has verified that the witness concerned falls under the category of a witness under threat or a vulnerable witness as defined in Article 148, respectively;
 - (b) with regard to a witness under threat, the judge has verified that a credible threat to the security of the witness or his or her family members exists. The threat must be substantiated by facts;
 - (c) with regard to a vulnerable witness, the witness is vulnerable as defined in Article 148;

- (d) the judge is convinced that the potential witness under threat or vulnerable witness is a credible witness;
 - (e) the testimony of the potential witness under threat or vulnerable witness is important for the criminal proceedings; and
 - (f) the need to grant the protective measure in favor of the witness under threat or the vulnerable witness and the needs of the criminal investigation are adequately balanced against the rights of the suspect or the accused.
7. Where the competent judge finds that the conditions set out in Paragraph 6 are met, the judge may make an order for protective measures, specifying:
 - (a) the name of the person to whom the protective measures will apply, unless the witness's name is being temporarily withheld;
 - (b) the particular protective measures that will apply to the witness;
 - (c) the duration of the application of the protective measures;
 - (d) that all persons with access to the protective measures order must not reveal the sealed order for protective measures;
 - (e) the consequences of revealing the contents of the sealed order for protective measures, including potential prosecution under Article 200 of the MCC; and
 - (f) the name of the court in which the decision was issued and the name and signature of the competent judge.
 8. The order for protective measures must be accompanied by a written and reasoned decision that must be released within a reasonable time after the order is made.
 9. Where an order for protective measures is not granted, a written and reasoned decision must be released within a reasonable time after the hearing on protective measures.
 10. An order for protective measures and the written decision on protective measures under Article 147(1)(a)–(e) must not contain any information that could lead to the discovery of the identity of the witness under threat or the vulnerable witness or the family of the witness.
 11. An order for protective measures and a decision on protective measures must not reveal the existence of, or expose to serious risk, the operational security of ongoing and confidential police investigations.
 12. An order for protective measures or the refusal of the competent judge to grant an order for protective measures may be appealed by way of interlocutory appeal under Article 295.

Commentary

Paragraph 6: Paragraph 6 sets out in full the grounds that must be found for the competent judge to grant a witness protection order. Not only must the judge inquire into the credibility of the threat to a proposed witness under threat and the vulnerability of a potential vulnerable witness on the basis of substantiated facts, but also the judge must make a full inquiry into the credibility of the witness by questioning the witness at the hearing. The drafters of the MCCP had at a certain point considered whether a hearing on witness protection measures was required in every case. It was considered imperative that, with the exception of the temporary removal of the accused under Article 147(f), a hearing always be conducted, given the need to verify the credibility of the witness. Another element of the judge's reasoning on whether or not to grant a witness protection measure is the balancing of the need to protect the witness and the needs of the criminal investigation with the rights of the suspect or the accused. This is a fundamental element in the determination of any measure of witness protection or witness anonymity because these measures impact upon the rights of the suspect or the accused.

Article 152: Records Relating to a Protective Measures Hearing

1. A closed protective measures hearing must be recorded in accordance with Article 37.
2. Information in the record of the closed session must be removed from the court file.
3. Information relating to the protective measures hearing, and all other information relating to protective measures, including the original motion for protective measures, must be sealed and stored in a secure place, under lock, and separately from the court file.
4. The restricted data may be inspected and used only by the prosecutor, the competent judge, and the appeals court hearing an appeal under Article 295.

Commentary

To protect the identity of the witness under threat or vulnerable witness, all documentation and recordings of the hearing on protective measures must be sealed. The court file may record that a witness is subject to an order for protective measures. It will also

contain the order and the written and reasoned judgment. However, the full record of the hearing must be removed and stored in a secure location so that no one except the judge and the prosecutor, and where there is an appeal under Article 295, the appeals court may have access to it. The records should be stored in a separate locked room.

Article 153: Service of an Order for Protective Measures

The order for protective measures and the written decision must be served under seal upon the prosecutor and the suspect or the accused in accordance with Article 27.

Commentary

The person who serves the order for protective measures or the decision must not have access to the information contained in either. In practice, this means that the judge must sign and seal the order and decision, which must then be served, untampered with, to the suspect or the accused and the prosecutor. Ideally, the order or decision should be accompanied by a note to inform the recipient that he or she should have received a sealed package and, if otherwise, to report this immediately to the competent judge.

Article 154: Amendment of an Order for Protective Measures

1. Where an order for protective measures has been granted, it may be amended upon the motion of the party who filed the initial motion. The competent judge may decide upon the motion without a hearing, or the judge may convene a hearing in accordance with Article 151.
2. The order for protective measures may be amended only by the judge who made the original order for protective measures. If the competent judge is not available, another judge must be designated by the judge administrator.

Commentary

Paragraph 1: The need to amend an order for protective measures may arise, for example, where an additional protective measure is required to adequately protect the witness.

Paragraph 2: In the unlikely event that the original judge who issued the order is unavailable, for example, due to illness or incapacity, another judge must be designated. The judge administrator should select a suitable judge, who must then make himself or herself familiar with the motion, the order, and the decision and who can have access to the records of the hearing prior to determining a motion for the amendment of the original motion.

Article 155: Appeal

A decision to grant or not to grant an order for protective measures may be appealed under Article 295.

Section 2: Witness Anonymity for Witnesses under Threat

General Commentary

Where witness anonymity is granted by a court, the identity and whereabouts of a witness will be withheld from the public, the press, and the defense. The granting of witness anonymity is an exceptional measure and applies only to a witness under threat as defined in Article 148 and not to a vulnerable witness. In addition, witness anonymity may be granted only where protective measures are insufficient to guarantee the witness's safety and that of the witness's family. It is worth noting that witness anonymity may be granted in favor of a *precious witness*, meaning a witness, such as an undercover agent or an informant, for whom a public interest exists not to reveal his or her identity because this would compromise their future deployment. Under international human rights jurisprudence, a precious witness may benefit from a witness anonymity order only where the precious witness falls into the category of a witness under threat.

Witness anonymity can be applied for at any stage of the proceedings, not just during the investigation of a criminal offense. For example, the prosecutor could make a motion for witness anonymity during the trial of an accused.

Witness anonymity is rarely granted because it impacts greatly on the fundamental rights of the accused such as the right to examine or have examined witnesses against him or her (contained in Article 64). The rationale for allowing such intrusive measures is based on the need to protect the rights of witnesses during trial. Thus, the rights of the accused are balanced with the rights of the witness. The European Court of Human Rights has sanctioned the use of witness anonymity measures in exceptional circumstances. In *Doorson v. Netherlands* (application no. 20524/92 [1996] ECHR 14 [March 26, 1996]), the European Court ruled that the use of anonymous witnesses does not automatically vitiate the rights of the accused to a fair trial. It further stated that countries “should organise their criminal proceedings in such a way that those interests [of witnesses] are not unjustifiably imperilled” and advocated a balancing of interests in determining the appropriateness of an order granting witness anonymity: “[P]rinciples of fair trial also require that in appropriate cases the interests of the defense are balanced against those of witnesses or victims called upon to testify” (paragraph 70). The use of anonymous witnesses has also been approved of by the International Criminal Tribunal for the former Yugoslavia (see *Prosecutor v. Tadic*, Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, August 10, 1995). Anonymous witness legislation has been introduced in some post-conflict states, such as Kosovo and Bosnia and Herzegovina, in the form of UNMIK Regulation 2001/20 on the Protection of Injured Parties and Witnesses during Criminal Proceedings and the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, respectively. In contrast, some other states prohibit the use of witness anonymity on account of the constitutional prohibition on interference with the accused’s right to examine or to have examined witnesses against him or her.

Where witness anonymity has been allowed in both domestic and international settings, its use has been carefully regulated. It should not be employed where “a less restrictive measure can suffice” (*Van Mechelen v. Netherlands*, application no. 21363/93, 21364/93, 21427/93 [1987] ECHR 90 [April 23, 1997], paragraph 58). A number of guiding principles to regulate witness anonymity have been articulated by the European Court of Human Rights, where the issue of witness anonymity has been litigated. For example, the European Court has articulated the following requirements:

- (1) The granting of an anonymous witness order should be an exceptional measure (*Van Mechelen v. Netherlands*, paragraph 56).
- (2) The need for anonymity must be objectively demonstrated in respect to each witness (*Van Mechelen v. Netherlands*, paragraphs 60–62).
- (3) The use of anonymous witnesses must be “sufficiently counterbalanced by the procedures followed by the judicial authorities” (*Doorson v. Netherlands*, paragraphs 72 and 75). The mechanism by which such a balance can be struck

should be an independent “verification procedure” (see Council of Europe Recommendation no. R (97) 13 [1997], paragraph 10). The European Court in *Van Mechelen* found that where an investigating judge had assessed the reliability and credibility of the anonymous witness, without the authorization of a judge (acting as an independent verifier) not involved in the main trial, that assessment represented a breach of the rights of the accused.

- (4) The judge, in considering whether or not to grant an order of anonymity, must undertake a thorough “examination into the seriousness and well-foundedness” of the fears of the witness seeking anonymity (*Visser v. Netherlands*, application no. 26668/95, [2002] ECHR 108. [February 14, 2002]).
- (5) Any conviction should not be based solely or to a decisive extent upon anonymous statements (*Doorson v. Netherlands*, paragraph 76; *Visser v. Netherlands*, paragraphs 50 and 54; and Council of Europe Recommendation no. R (97) 13, paragraph 13).

These fundamental principles have been integrated into Section 2 and also in Article 263 of the MCCP, which provides that a conviction may not be based solely or to a decisive extent upon anonymous statements.

In addition to the foregoing safeguards, Section 2 incorporates a number of additional safeguards articulated by the International Criminal Tribunal for the Former Yugoslavia (ICTY) in the *Tadic* decision; namely, that the evidence must be sufficiently important to make it unfair for the prosecutor to proceed without it (see Article 157[1][b]), that the judge know the identity of the witness and inquire into the reliability of the person for whom the order is sought (Article 157[1][c]), and that the defense be given the opportunity to examine the witness on all issues except the identity and whereabouts of the witness or his or her family members (Article 244[3]).

Article 156: Witness Anonymity

1. Witness anonymity refers to the absence of revealed information regarding the identity or whereabouts of a witness under threat or the identity of a family member of a witness under threat.
2. Witness anonymity is an exceptional measure and must be granted only in exceptional circumstances in favor of a witness under threat where protective measures under Articles 147–155 are insufficient to guarantee the protection of the witness under threat.

Commentary

Paragraph 1: See Article 148(a) for a definition of “witness under threat.”

Paragraph 2: This paragraph sets out the principle enunciated by the European Court of Human Rights, and discussed above in the general commentary to Section 2, that witness anonymity should be an exceptional measure. If a judge finds that the safety and security of a witness may be protected through any of the protective measures listed in Article 147 or any combination of them, then witness anonymity should not be granted.

Article 157: Grounds for Seeking an Order for Witness Anonymity

1. An order for anonymity may be granted in favor of a witness under threat where:
 - (a) a serious risk to the witness under threat or to a family member of the witness under threat exists if complete anonymity is not granted;
 - (b) the testimony of the witness during the investigation or at trial is relevant to a material issue in the case so as to make it unfair to compel either the defense or the prosecutor to proceed without it;
 - (c) the credibility of the witness has been fully investigated and disclosed to the court in closed session by the party who filed the motion for witness anonymity and where the court determines that the witness is fully credible; and
 - (d) the need for anonymity of the witness outweighs the interest of the public, the suspect or the accused, and his or her defense counsel in knowing the identity of the witness.
2. A “witness under threat” has the same meaning as in Article 148(a).

Commentary

The criteria set out in Article 157 for the granting of an anonymous witness order were derived from the jurisprudence and international standards on the use of anonymous witnesses discussed in the general commentary to Section 2. Reference should be made to the general commentary for further discussion on these standards.

Article 158: Procedure for Seeking a Motion for Witness Anonymity

1. The prosecutor or the defense may file a motion for witness anonymity.
2. The motion for witness anonymity must be filed in a sealed envelope to the registry of the competent trial court clearly indicating on the outside that this envelope contains a motion for witness anonymity and only the competent judge and the prosecutor may have access to the sealed contents.
3. The motion for witness anonymity must contain:
 - (a) the name of the competent trial court to which the motion is being submitted;
 - (b) the name of the party filing the motion;
 - (c) the name of the proposed witness under threat;
 - (d) information concerning the criminal proceedings in which the proposed witness under threat is to testify in, including the name of the suspect or the accused and the criminal offense that he or she is suspected or accused of;
 - (e) a description of the factual circumstances that substantiate the need to declare the witness to be a witness under threat;
 - (f) the facts that indicate a serious risk to the witness under threat or to a family member of the witness under threat if complete anonymity is not granted as set out in Article 157(1)(a);
 - (g) information relating to the evidence the proposed witness under threat will provide at the trial of the criminal offense, including its materiality to the case as set out in Article 157(1)(b);
 - (h) the investigations undertaken by the party filing the motion into the credibility of the witness as set out in Article 157(1)(c); and
 - (i) a request to the competent judge to grant an order of anonymity.
4. The registry must forward the sealed motion immediately to the competent judge.

Commentary

Just like with a motion for protective measures, a motion for witness anonymity can be submitted by either the prosecutor or the defense. In the case of witness anonymity, however, in contrast to witness protection measures, a witness cannot submit a motion. The motion for witness anonymity is filed in much the same way as a motion for protective measures. The ultimate aim of the requirements set out in Article 158 is to ensure that no one except the party submitting the motion, the judge, and the prosecutor has access to the sensitive information contained in the motion.

Article 159: Witness Anonymity Hearing

1. Upon receipt of the motion for witness anonymity, the competent judge must set a date for a witness anonymity hearing in closed session.
2. Where the motion for witness anonymity has been submitted by the suspect or the accused, the suspect or the accused, the prosecutor, and the potential witness under threat must be informed of the date and time of the hearing under a sealed notice served in accordance with Article 27. The prosecutor must also be present at the hearing on a motion for witness anonymity.
3. Where the motion for witness anonymity has been submitted by the prosecutor, the prosecutor and the potential witness under threat must be informed of the date and time of the hearing under a sealed notice served in accordance with Article 27. The suspect or the accused and his or her defense counsel may not be present at a hearing on a witness anonymity motion filed by the prosecutor.
4. The witness anonymity hearing must be held in closed session and may include only the prosecutor, the witness in question, the suspect or accused, his or her defense counsel, where the application has been made by the suspect or the accused, and essential court and prosecution personnel.
5. At the witness anonymity hearing, the competent judge must consider all the issues set out in Article 157(1) through questioning of the witness and other persons that the judge considers necessary to question.
6. Where a witness is examined at the witness anonymity hearing, he or she must make a solemn declaration under Articles 247, 248, or 249. The competent judge must issue the warning set out in Article 252. The competent judge must also inform the witness of his or her right to be free from self-incrimination under Article 251.

7. The judge may grant an order for anonymity where the conditions in Article 157 are met.
8. The order for witness anonymity must specify:
 - (a) the fact that an order for witness anonymity has been granted;
 - (b) that all persons with access to the witness anonymity order must not reveal the contents of the sealed order;
 - (c) the consequences of revealing the contents of the sealed order for witness anonymity, including potential prosecution under Article 200 of the MCC; and
 - (d) the name of the court in which the decision was issued and the name and signature of the competent judge.
9. The order for anonymity must be accompanied by a written and reasoned decision that must be released within a reasonable time after the order is made.
10. Where an order for witness anonymity is not granted, a written and reasoned decision must be released within a reasonable time after the hearing on witness anonymity.
11. The order for witness anonymity, if granted, and the written decision on witness anonymity must not contain any information that could lead to the discovery of the identity of the witness under threat or his or her family, or that could reveal the existence of, or expose to serious risk, the operational security of ongoing and confidential police investigations.

Commentary

Unlike in the case of a motion for protective measures where the judge has discretion to call a hearing or not, when a motion for witness anonymity is submitted to the court, the competent judge must schedule a closed hearing. This hearing will always be attended by the judge, essential court personnel (e.g., to record the session), the potential witness under threat, and the prosecutor. Where the motion for witness anonymity is filed by the suspect or accused person, he or she and counsel for the suspect or the accused may also be present. At the hearing, the judge, through questioning the potential witness under threat and any other person, must ascertain whether the criteria set out in Article 147(1) are met. Where the judge finds that an order for witness anonymity is necessary, he or she must write up an order immediately and later draft a written judgment. Where no order for witness anonymity is granted, the judge must also draft a written judgment. This judgment will be important if a person seeks to appeal the decision not to grant the order under Article 162. It will be equally important if the defense seeks to appeal a decision to grant an order for witness anonymity under the same article. The judgment and the order must be scrutinized prior to transmission

to ensure that no information concerning the identity of the witness under threat is revealed and that no information concerning other ongoing investigations is revealed.

Article 160: Records Relating to an Order for Witness Anonymity

1. The closed witness anonymity hearing must be recorded in accordance with Article 37.
2. Information in the record of the closed session must be removed from the court file.
3. Information relating to the witness anonymity hearing, and all other information relating to witness anonymity, including the original motion for witness anonymity, must be sealed and stored in a secure place, under lock and separate from the court file.
4. The restricted data may be inspected and used only by the prosecutor, the competent judge, and the appeals court hearing an appeal under Article 295.

Commentary

It is important that the witness anonymity hearing be recorded, particularly where an appeal against the decision is filed. It is equally important that the information derived from the hearing not be accessed by any person who was not present at the hearing or who does not have a right to this information. Thus, the transcript of the proceedings, or a summary as the case may be (see Article 37 for a discussion on records of hearings), must be removed from the general case file. The order and the decision can remain in the file. They must, however, be sanitized to make sure that they contain no information that identifies the witness under threat or his or her whereabouts. Provision should be made in the courthouse for separate storage of sealed documents under lock and in a restricted area.

Article 161: Service of an Order for Witness Anonymity

The order for witness anonymity and the decision on witness anonymity must be served under seal on the suspect or the accused and the prosecutor in accordance with Article 27.

Commentary

The person who serves the order for witness anonymity or the decision must not have access to the information contained in either. The judge must sign and seal the order and decision, which must then be served, untampered with, to the suspect or the accused and the prosecutor. The order or decision should be accompanied by a note informing the recipient that he or she should have received a sealed package and, if otherwise, to report this immediately to the competent judge.

Article 162: Appeal

A decision to grant or not to grant an order for witness anonymity may be appealed under Article 295.

Commentary

The decision by the competent judge to grant or not to grant an order for witness anonymity can be appealed by either the defense or the prosecutor by way of interlocutory appeal. It may also be appealed by a witness, for example, where the judge refuses to grant an order for witness anonymity.

Section 3: Immunity from Prosecution for Cooperative Witnesses

General Commentary

Section 3 establishes a legal process where a person who is a suspect (as defined under Article 1[43]) may, through the prosecutor, request that the court declare that he or

she is a *cooperative witness*. The effect of being declared a cooperative witness is that the witness is immune from prosecution for a particular criminal offense or offenses that he or she was suspected of and that are the subject of the cooperative witness order. The offense or offenses for which the witness is granted immunity will be decided on by the court during the cooperative witness hearing, and the person will still be liable for prosecution for other alleged criminal acts.

The use of cooperative witnesses is an important tool for the police and prosecution in the investigation of criminal offenses, particularly those of a more serious nature. In cases such as organized crime, for example, it is extremely difficult to gather the testimony of witnesses. The evidence of a cooperative witness about an organized criminal group and its leaders can prove invaluable in facilitating a thorough investigation and presentation of evidence. The usefulness of cooperative witnesses has been recognized in the United Nations Convention against Transnational Organized Crime (Article 26[3]), which urges states parties “to consider providing the possibility ... of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offense covered by this Convention.”

It is important to consider the cooperative witness mechanism contained in the MCCP in comparison to other ways of securing the cooperation of witnesses who are suspected of committing a criminal offense. The sort of immunity provided under the MCCP is *full immunity* or *transactional immunity*, whereby prosecution of the cooperative witness for named criminal offenses is barred. In some states, *partial immunity* or *use immunity* is granted to a cooperative witness by a court. Use immunity means that the testimony a witness gives when cooperating with the authorities may not be used directly or indirectly in a subsequent prosecution against him or her. In other states, cooperative witnesses are granted immunity by the prosecutor rather than by the court through the drafting of nonprosecution agreements or cooperation agreements. Such an agreement may form part of plea bargaining, or, as the MCCP designates it, “Proceedings on Admission of Criminal Responsibility” (Article 87). Under a nonprosecution agreement, a prosecutor will grant full immunity from prosecution to a suspect for a particular criminal offense in exchange for his or her cooperation in another case. A cooperation agreement, on the other hand, focuses on the mitigation of a sentence, whereby the prosecutor agrees to file a motion with the court suggesting that the sentence of the accused person be reduced. The latter is not, however, a legally binding agreement, and a judge is not obliged to follow it. Under the MCCP, in addition to the cooperative witness mechanism in Section 3, a prosecutor could enter into a cooperation agreement with a witness. However, in accordance with Article 95(6) of the MCC, this agreement would not be binding upon the court in the determination of a penalty.

Some states have been reticent to introduce cooperative witness mechanisms that provide for full immunity from prosecution because, for example, domestic law provides for mandatory prosecution or because these states believe that cooperative witness mechanisms violate the principle of equality before the law and are open to abuse. The possible negative public reaction to the fact that a person suspected of a criminal offense was set free without prosecution has also made some states reticent to adopt such mechanisms. It is important to consider these factors, and particularly public perceptions, in determining whether to introduce a cooperative witness mechanism into domestic law, particularly in post-conflict states where a history of using “collabo-

rators of justice” to convict persons may exist. In some post-conflict states such as Kosovo, provisions on cooperative witnesses have been introduced into domestic law to address serious crimes like organized crime (see UNMIK Regulation 2001/21 on Cooperative Witnesses).

Reference should be made to Article 263(7), which provides that, in determining the outcome of a case, the judge or panel of judges not base a verdict “solely, or in the absence of corroborating evidence, to a decisive extent” on the evidence of a single cooperative witness.

Article 163: Definition of a Cooperative Witness

1. A cooperative witness is a person who is:
 - (a) suspected of having committed a criminal offense or who has been indicted, but where the indictment has not yet been read at the confirmation hearing under Article 201; and
 - (b) expected to give evidence in court that:
 - (i) is likely to prevent criminal offenses by another person or to lead to the finding of truth in a criminal proceeding or that may lead to the successful prosecution of the perpetrator of a criminal offense;
 - (ii) is voluntarily made with full agreement to testify truthfully in court; and
 - (iii) is judged by the court to be truthful and complete.
2. A person who has previously been granted witness anonymity under Chapter 8, Part 4, Section 2, may not be granted the status of a cooperative witness.
3. A person who has been granted the status of a cooperative witness may not subsequently be granted the status of an anonymous witness under Chapter 8, Part 4, Section 2.
4. No order may be issued if the person seeking cooperative witness status is suspected or accused of:
 - (a) genocide, crimes against humanity, or war crimes;
 - (b) a criminal offense that carries a potential penalty of more than fifteen years of imprisonment; or
 - (c) being the organizer or the leader of a group of two or more persons that committed a serious criminal offense that carries a potential penalty of

more than ten years of imprisonment or that resulted in the death or serious bodily injury of a person.

Commentary

Paragraph 1: A cooperative witness may be a person who has not been arrested or detained but is under investigation (whether the investigation has officially been initiated under Article 94 of the M CCP or not) and is suspected of committing a criminal offense. A suspect becomes an accused (as defined in Article 1[1]) upon the confirmation of an indictment against him or her under Article 201(7). Once the indictment has been confirmed, a person cannot qualify as a cooperative witness.

Paragraphs 2 and 3: The granting of an order for witness anonymity impinges greatly on the right of the accused to fully examine the witness, and this impedes his or her defense. If a person was granted anonymity and was simultaneously granted immunity from prosecution for another offense, the accused person would be at too great a disadvantage. Where a person is a cooperative witness and his or her identity is known to the accused, the accused can challenge the credibility of the witness or his or her evidence. This is important given the fears as to the reliability of statements obtained from cooperative witnesses, who have a great incentive to testify, given that the act of testifying will grant them immunity from prosecution.

Paragraph 4(a): Given the heinous nature of the criminal offenses of genocide, crimes against humanity, and war crimes, the M CCP does not allow the granting of immunity from prosecution in these cases. This is consistent with the practice of the Nuremberg Tribunal (Rule [2c] of the Rules of Procedure of the International Military Tribunal at Nuremberg), the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. In the words of Antonio Cassese, former president of the International Criminal Tribunal for the former Yugoslavia, “no one shall be immune from prosecution for crimes such as these, no matter how useful their testimony is” (UN document IT-29). To provide for immunity from prosecution for these crimes would be inconsistent with the principle of individual responsibility originally enunciated at Nuremberg.

Paragraph 4(b) and (c): In general, the purpose of a cooperative witness mechanism is to obtain the testimony of those involved in less serious crime, for example, those at the lower ranks of an organized criminal gang, against those involved at the highest level of an organized criminal gang. Consequently, Paragraph 4(b) and (c) precludes a person accused of an offense that carries a potential penalty of more than fifteen years or a person who is the leader of a group engaged in certain criminal activities that carry a potential penalty of more than ten years from obtaining cooperative witness status.

Article 164: Procedure for Seeking a Cooperative Witness Order

1. A prosecutor may file a motion with the registry of the competent trial court for a cooperative witness order.
2. The motion for a cooperative witness order must be submitted to the registry of the competent trial court in a sealed envelope clearing indicating on the outside that it is a motion for a cooperative witness order.
3. The motion for a cooperative witness order must specify:
 - (a) the name of the competent trial court and the name of the party submitting the motion;
 - (b) the name of the person for whom cooperative witness status is being sought;
 - (c) any prior criminal offenses that the person in question has been accused or convicted of;
 - (d) the criminal offense, or offenses, that the person in question is being investigated for or is suspected of perpetrating;
 - (e) the criminal offense for which the prosecutor is seeking to grant immunity from prosecution by way of a cooperative witness order;
 - (f) details of the criminal proceedings in which the person for whom cooperative witness status is being sought has agreed to testify in, including the name of the accused person in those proceedings; and
 - (g) the evidence that the person for whom cooperative witness status is being sought has agreed to provide in criminal proceedings.
4. The motion for a cooperative witness order by the prosecutor must be accompanied by a separate declaration of factual allegations against the suspect or the accused in the case in which the cooperative witness is expected to give evidence. The prosecutor may make a request to the competent judge to keep the factual allegations, and the reasons for such a request, secret from the defense.
5. The competent judge may, at any time after receiving a request from the prosecutor to keep the factual allegations secret from the defense, make an order for nondisclosure with respect to factual allegations contained in the separate declaration.

6. The registry must forward the sealed motion for a cooperative witness order immediately to the competent judge.

Commentary

A motion for cooperative witness status originates with the prosecutor, who will most likely have had in-depth discussions with the potential cooperative witness to discuss the submission of the motion and to get his or her agreement to testify. Given the sensitive nature of a motion for cooperative witness status, and the fact that it contains evidence relating to another criminal proceeding, the motion must be submitted under seal and its contents not revealed to any persons, including the staff of the registry. Under Paragraph 6, the registry is required to pass the sealed motion along to a competent judge. The prosecutor must provide the details required under Paragraph 3. In addition, a separate declaration of factual allegations against the suspect or the accused must be submitted to the judge. At this stage, the defense will not be aware that a motion for cooperative witness status has been made, nor should it be aware of the details of this motion. Under Paragraph 4, the prosecutor may request that the judge not disclose the information to the defense in a separate declaration.

Article 165: Cooperative Witness Hearing

1. Upon receipt of the motion for a cooperative witness order, the competent judge must set a time and date for a cooperative witness hearing in closed session.
2. The prosecutor, potential cooperative witness, and counsel for the potential cooperative witness must be informed of the time and date of the cooperative witness hearing under a sealed notice of a cooperative witness hearing served in accordance with Article 27.
3. The accused person against whom the potential cooperative witness may testify, and his or her defense counsel, must not be present at the cooperative witness hearing.
4. The cooperative witness hearing in closed session may include only the prosecutor, the potential cooperative witness in question, counsel for the potential cooperative witness, and essential court and prosecution personnel.
5. The prosecutor and counsel for the potential cooperative witness may participate in questioning the person for whom cooperative witness status is being sought to evaluate his or her credibility and to ensure that the requirements in Article 163 are met.

6. Before the potential cooperative witness is questioned, the court must warn the witness about the consequences of making false statements, including the possibility of prosecution for the criminal offense of “False Statements of a Cooperative Witness” under Article 199 of the MCC.
7. Statements made during questioning must not be used in criminal proceedings against the cooperative witness, or against any other person, as evidence to support a finding of criminal responsibility.
8. At the conclusion of the hearing, and if the competent judge is satisfied that the criteria in Article 163 are met, the judge may make an order declaring that a person is a cooperative witness.
9. The cooperative witness order must:
 - (a) state that there will be no initiation or continuation of criminal proceedings against the cooperative witness for the criminal offense(s) specified in the order, and that no penalty may be imposed for the criminal offense so specified;
 - (b) specify the criminal offenses for which the prohibition of initiation or continuation of criminal proceedings against the cooperative witness applies;
 - (c) specify the nature and substance of cooperation that has been or that will be given by the cooperative witness;
 - (d) specify the conditions for the revocation of the order;
 - (e) outline the consequences of giving false statements to the prosecutor, the police, and the court, including potential prosecution under Article 199 of the MCC;
 - (f) require the cooperative witness to report to the judge any promises to, threats against, or inducements, payments, or offers that the cooperative witness has received;
 - (g) contain a declaration that the granting of a cooperative witness order in favor of a person does not prohibit the initiation or continuation of criminal proceedings against him or her for other criminal acts not specified in the order; and
 - (h) contain the name of the competent trial court and the name and signature of the competent judge.
10. The cooperative witness order, if granted, must be served in accordance with Article 167.

Commentary

A motion for cooperative witness status must always be determined in a closed hearing at which the prosecutor, the judge, the potential cooperative witness, and counsel for the cooperative witness, if available, are present (see Article 151[2]). The details of the time and place of the hearing must be delivered under seal to the parties attending to ensure that no information regarding the motion or the potential cooperative witness is revealed to anyone else. In the course of the hearing, the potential cooperative witness will be questioned by the court, in addition to the prosecutor and counsel for the cooperative witness (if either choose to do so), to ascertain whether the cooperative witness meets the criteria set out in Article 163.

At the end of the hearing, the judge may issue a cooperative witness order. The order does not provide blanket immunity for a person from criminal prosecution in the future. It is specific only to those offenses that are stated in the order. The cooperative witness may subsequently be tried for other conduct not mentioned in the order.

Article 166: Records Relating to a Cooperative Witness Hearing

1. The closed cooperative witness hearing must be recorded in accordance with Article 37.
2. Information in the record of the closed session must be removed from the court file.
3. The information relating to the cooperative witness hearing and all other information relating to the cooperative witness, including the original motion for the cooperative witness order, the factual declaration, and the decision, must be sealed and stored in a secure place, under lock and separately from the court file.
4. The restricted data may be inspected and used only by the prosecutor, the competent judge, and the appeals court hearing an appeal under Article 295.

Commentary

It is important that the cooperative witness hearing be recorded, but it is equally important that the information derived from the hearing not be accessed by any person who was not present at the hearing or who does not have a right to this information. Thus, the transcript of the proceedings, or a summary as the case may be (see Article 37 for a discussion on records of hearings), must be removed from the general

case file. The order and the decision can remain in the court file. The only person with access to the restricted data must be the competent judge and prosecutor. Provision must be made in the courthouse for separate storage of these sealed documents under lock and key in a restricted area.

Article 167: Service of a Cooperative Witness Order

The following persons must be served with a copy of the cooperative witness order within a reasonable time after the order is made:

- (a) the suspect or the accused against whom the cooperative witness is expected to testify and his or her counsel;
- (b) the cooperative witness; and
- (c) the prosecutor.

Article 168: Revocation of a Cooperative Witness Order and Liability for the Criminal Offense of False Testimony of a Cooperative Witness

1. The prosecutor may apply for the cooperative witness order to be revoked by filing a motion for revocation of a cooperative witness order with the registry of the competent trial court.
2. The motion for revocation of a cooperative witness order must be considered by a panel of three judges at a closed hearing.
3. The prosecutor, the cooperative witness, and counsel for the cooperative witness must be informed of the time and date of the cooperative witness revocation hearing under a sealed notice served in accordance with Article 27.
4. The cooperative witness order must be revoked by an order of the competent panel of three judges where it is established that the testimony of the cooper-

ative witness was false in any relevant part or that the cooperative witness purposely omitted to state the complete truth.

5. A cooperative witness whose testimony was false in any relevant part, or who purposely omitted to state the complete truth to the prosecutor, the police, or the court is liable for the criminal offense of “False Statements of a Cooperative Witness” under Article 199 of the MCC.

Commentary

At any time after the cooperative witness order has been made, the prosecutor by way of a motion may request that a panel of judges be convened to consider revoking the order. A panel of three judges will consider the motion at a closed hearing that the prosecutor and the cooperative witness attend. If the judges conclude that the cooperative witness has in fact made false statements, they will immediately revoke cooperative witness status, which leaves the former cooperative witness open to prosecution for the offenses that he or she previously had immunity as well as from prosecution under Article 199 of the MCC.

Chapter 9: Arrest and Detention

Part 1: Arrest

Article 169: The Right to Presumption of Liberty and Freedom from Arbitrary Arrest or Detention

1. No person may be subjected to arbitrary arrest or detention.
2. No person may be deprived of his or her liberty except on such grounds and in accordance with such procedures as prescribed by the applicable law.

Commentary

Paragraph 1: The right of a person to not be arbitrarily arrested or detained is found in Article 9 of the Universal Declaration of Human Rights, Article 9(1) of the International Covenant on Civil and Political Rights, Article 6 of the African Charter on Human and Peoples' Rights, Article XXV of the American Declaration of the Rights and Duties of Man, Article 7(3) of the American Convention on Human Rights, Article 20 of the Cairo Declaration of Human Rights in Islam, and Principle 2 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The concept of arbitrariness applies to both the law under which a person is arrested and to the application of the law. An arrest or detention may be arbitrary if the law is arbitrary or if the actions of a criminal justice actor (e.g., a police officer) are arbitrary. The term *arbitrary* has been interpreted as meaning an arrest or detention that includes elements of inappropriateness, injustice, and lack of predictability and due process of law (see the United Nations Human Rights Committee case of *Albert Womah Mukong v. Cameroon*, UN document CCPR/C/51/D/458/1991 [1994], paragraph 9.8). The United Nations Human Rights Committee has stated that arbitrariness is broader than the concept of "unlawfulness." Amnesty International's *Fair Trials Manual* further provides that "an arrest or detention which is lawful may nonetheless be arbitrary under international standards, for example, if the law under which the person is detained is vague, overbroad, or is in violation of other fundamental standards" (Section 1.3). The International Bar Association's *Manual on Human Rights and the Administration of Justice* states that "the prohibition of arbitrariness also of

course means that deprivations of liberty must not be motivated by discrimination” (Chapter 5, Section 4.2). This would also be a breach of the individual’s right to freedom from discrimination set out in Article 55 of the MCCP.

The definition of *arrest* may be found in Article 1(3) of the MCCP; the definition of *detention* may be found in Article 1(13).

Paragraph 2: In addition to the prohibition on an arrest being arbitrary, an arrest or detention must not be unlawful. This prohibition is found in international instruments such as the International Covenant on Civil and Political Rights (Article 9[1]), the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5[1]), and the African Charter on Human and Peoples’ Rights (Article 6). There are two elements to unlawfulness here: (1) “on such grounds” is a substantive requirement that the grounds of arrest or detention are valid, and (2) “in accordance with such procedures as prescribed by the applicable law” requires that the legally required procedures are complied with. The European Court of Human Rights has stated that in order to assess the lawfulness of arrest or detention, the arrest or detention must be in conformity with the substantive and procedural rules of domestic law (see *Kemmache v. France* [no. 3], application no. 17621/91 [1994], ECHR 41 [November 24, 1994], paragraph 42). If, for example, a person is arrested under the MCCP without a warrant where none of the grounds for a warrantless arrest under Article 170(1) exist, the arrest would be unlawful. If a person is arrested without probable cause, under Article 171, the arrest would also be unlawful.

Article 170: Arrest without a Warrant

1. The police may arrest a person without a warrant where:
 - (a) he or she is found in the act of committing a criminal offense;
 - (b) the police are in hot pursuit of a person immediately after commission of a criminal offense;
 - (c) probable cause exists that a person has committed a criminal offense and that there is a likelihood that before a warrant could be obtained the suspect will flee or destroy, hide, taint, or falsify evidence of a criminal offense, or pressure, manipulate, or otherwise influence a witness, a victim, or an accomplice; or
 - (d) probable cause exists that a suspect has violated one of the restrictive measures imposed on him or her under Article 184.
2. Where the police arrest a person without a warrant, they must orally notify the prosecutor immediately.

3. In addition to the notification requirement contained in Paragraph 2, the police must also, without undue delay, submit a report of the arrest to the prosecutor. The report must detail the circumstances in which the arrest was made.
4. Where the prosecutor establishes that:
 - (a) he or she will not file a motion for detention; or
 - (b) he or she will not initiate or continue an investigation
 the prosecutor must order that the arrested person be released.
5. A person arrested without a warrant under Article 170 must be brought before the court promptly and no later than seventy-two hours after arrest to determine the issue of detention under Article 175.

Commentary

Article 170 sets out grounds upon which a person may be arrested without a warrant. The first ground is where a person is found in the act of committing a criminal offense. It is near universal practice that a person may be arrested when he or she is caught in the act of committing a criminal offense (sometimes known as “in flagrante delicto” meaning “when the crime is blazing”). The second permissible ground for a warrantless arrest is known as the “hot pursuit” exception. This means that where a police officer is chasing a person who is suspected of committing a criminal offense, the police officer may make an arrest without a warrant. The concept of “immediately after” is interpreted differently across jurisdictions. In some jurisdictions, it means seventy-two hours after the crime was committed, although in general it means several hours (see Amnesty International, *Understanding Policing: A Resource for Human Rights Activists*, page 157). The third ground for a warrantless arrest is where police have probable cause to believe that the person has committed a criminal offense but that before a warrant could be obtained the person will either flee or interfere with the evidence of a victim, a witness, or an accomplice. These are the same grounds that are provided in Article 177(2)(a) and (b) with regard to detention. Finally, a police officer may arrest a person where he or she reasonably suspects that the person has violated the restrictive measures imposed upon him or her.

Where a warrantless arrest is made, the police officer must make an immediate report to the prosecutor, who is in charge of leading the investigation. The prosecutor will then decide how to proceed, as provided for in Paragraph 4.

It is worth noting that in some legal systems, when a person is arrested, that is taken to mean that he or she is both apprehended and taken into police custody. In other legal systems, the term *arrest* is taken to mean only apprehension. For a person to be taken into police custody, a separate detention warrant is required. The MCCC envisages the former system of arrest.

Paragraph 5: Article 9(3) of the International Covenant on Civil and Political Rights, Article 7(5) of the American Convention on Human Rights, Article 5(3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article XI of the Inter-American Convention on Forced Disappearance of Persons, Article 10(1) of the United Nations Declaration on the Protection of All Persons from Enforced Disappearances, and Principle 11(1) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment all require that an arrested person be brought “promptly” before a judge. No definition of promptly is provided in international law. General Comment no. 8 of the United Nations Human Rights Committee states that “delays should not exceed a few days.” The European Court of Human Rights has set no limit to the meaning of promptly; rather time limits have been assessed on a case by case basis. The European Court has ruled that holding a person for four days and six hours is a violation of Article 5(3) of the European Convention on Human Rights and Fundamental Freedoms (see *Brogan v. United Kingdom*, application nos. 11209/84, 11266/84 [1988] ECHR 24 [November 29, 1988]). In another case, it found that four days is consistent with Article 5(3) (see *Egue v. France*, application no. 11256/84).

The MCCP sets seventy-two hours as the upper limit. This is toward the far end of the period within which a person should be brought before a judge in most states, but the drafters considered it preferable to allow for a slightly longer period given the inevitable resource and other constraints faced by post-conflict states. Ideally, the authorities will bring the person before a judge in advance of this time limit, particularly in the case of juveniles (see Article 333[1]). Where an arrested person is brought before the judge only after seventy-two hours, the police or the prosecutor should justify to the court why it took so long to bring the arrested person before it.

Article 171: Arrest under Warrant

1. Except as otherwise provided for in Article 170, a warrant is required for the arrest of a person.
2. The prosecutor may make an application for an arrest warrant where:
 - (a) probable cause exists that the person has committed a criminal offense; and
 - (b) reasonable grounds for detention under Article 177(2) exist.
3. The application for an arrest warrant must contain the following:
 - (a) the name of the suspect and any other identifying information, including the location of the suspect, if known;
 - (b) a summary of the facts that are alleged to constitute a criminal offense and a specific reference to the criminal offense for which the arrest of the

suspect is sought, including a reference to the relevant legal provisions;
and

- (c) a request to the competent judge to issue an arrest warrant.
- 4. Where the requirements of Paragraph 2 are met, the competent judge may issue an arrest warrant.
- 5. The arrest warrant must contain the following:
 - (a) the name of the suspect and any other identifying information, including the location of the suspect, if known;
 - (b) a summary of the facts that are alleged to constitute a criminal offense and a specific reference to the criminal offense for which the arrest of the suspect is sought, including a reference to the relevant legal provisions;
 - (c) the authority authorized to execute the arrest warrant;
 - (d) the date of the arrest warrant; and
 - (e) the signature of the competent judge.
- 6. A person arrested under a warrant must be brought before the court promptly and no later than seventy-two hours after arrest to determine the issue of detention under Article 175.

Commentary

An arrest is an obvious interference with a person's right to liberty, yet it can also be a necessary measure in criminal proceedings. As outlined in Article 169, the arrest must be both nonarbitrary and lawful. Under the M CCP, an arrest is lawful only where a warrant is obtained or where the grounds for an arrest without a warrant as defined in Article 170(1) are present. In some legal systems, when a person is arrested, it is taken to mean that he or she is both apprehended and taken into police custody. In other legal systems, the term *arrest* is taken to mean only apprehension. For a person to be taken into police custody, a separate detention warrant is required. The M CCP envisages the former system of arrest.

An arrest under warrant of the sort contained in Article 171, namely a police arrest that is ordered by a judge, will likely be used rarely. Under the M CCP, the grounds upon which an arrest may be made are limited to those that are strictly necessary. In many states, a person may be arrested where there is a "reasonable suspicion" or "probable cause" (see the definition in Article 1[40]) that he or she committed a criminal offense. The M CCP contains this standard in part but adds to it that an arrest warrant may be issued only where the grounds of detention set out in Article 177(2) are present. In all other cases, except those specified in Article 170(1), a suspect should not be arrested. The prosecutor will continue the investigation, and if the prosecutor finds valid grounds to pursue the prosecution, the prosecutor may present an indictment to the court under Article 195.

The rationale for limiting the scope for use of an arrest warrant is that the drafters of the Model Codes believed that an arrest should not be used automatically for all suspects, especially for suspects in less serious crimes and for suspects who do not present a flight risk or a danger to the community. According to Amnesty International's *Understanding Policing: A Resource for Human Rights Activists*, "the decision as to whether or not to arrest a person depends on many factors such as the actual offense, the behavior of the suspect, as well as the experience and the skill of the police officer" (page 156). All too often, arrests leading to pretrial detention are conducted as a matter of common practice, leading to gross prison overcrowding and the unnecessary pretrial detention of suspects.

Paragraph 5: Reference should be made to the commentary to Article 170(5) for the discussion of the meaning of Paragraph 5.

Article 172: Procedure upon Arrest

1. When a person is arrested pursuant to an arrest warrant under Article 171, the police must give the arrested person a copy of the arrest warrant.
2. At the time of arrest, the police must orally inform the arrested person, in a language he or she understands, of:
 - (a) the reasons for his or her arrest;
 - (b) his or her right to remain silent; and
 - (c) his or her right to notify a family member or another appropriate person and his or her counsel.
3. An arrested person must also be informed, both orally and in writing, in a language he or she understands, that he or she has the right to:
 - (a) silence and not to incriminate himself or herself, and to be cautioned that any statement he or she makes may be recorded and used in evidence;
 - (b) legal assistance of the arrested person's choice or if he or she qualifies for it, the right to be provided with free legal assistance in accordance with Article 67 or 68;
 - (c) contact counsel and communicate with him or her freely and confidentially;
 - (d) the presence of counsel during all questioning by police;
 - (e) notify or require the police to notify a family member or another appropriate person of his or her choice about the arrest, place of detention, and any transfer of detention;

- (f) be brought promptly before a judge no later than seventy-two hours after arrest in order for the judge to assess the legality of arrest;
 - (g) contact and communicate orally or in writing with a liaison office, consular post, or the diplomatic mission of the state of which he or she is a national, if the suspect is a foreign national, or with the representative of the competent international organization, if he or she is a refugee or is otherwise under the protection of an intergovernmental organization;
 - (h) petition the court for release from any unlawful arrest or detention by filing a motion for habeas corpus under Chapter 16 of the MCCC;
 - (i) the assistance of an interpreter, free of cost, if the arrested person cannot understand or speak the language being used for questioning, and such translations as are necessary to meet the requirements of fairness; and
 - (j) access to a doctor, including the right to be examined if the arrested person so wishes. If no doctor is available, the arrested person has the right to be examined by a nurse or another medical professional.
4. No later than six hours after arrest, an arrested person must be given a written record specifying the reasons for arrest and providing details of his or her rights.
 5. Upon being given a written record of his or her rights, the arrested person must be asked by the police to sign the record acknowledging receipt of this record. Where the person refuses to sign the record, this must be noted in the record, as well as the reasons for the refusal to sign the record.
 6. An arrested person must be given written notification of the charges leveled against him or her.
 7. The arrested person must be registered by the police in accordance with the Model Detention Act and follow the other procedures set out in the Model Detention Act.

Commentary

Paragraph 1: Principle 12(2) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that an arrested person receive a record of the arrest. Paragraph 1 partially gives effect to this international standard by requiring that the arrest warrant be made available. Possessing this information will be crucial where an arrested person seeks to challenge the lawfulness of his or her arrest under Chapter 16 or where the person is later seeking compensation for unlawful arrest under Chapter 17. It is also important to have the arrest warrant and

surrounding information as part of the “facilities” required to facilitate the right to prepare a defense under Article 61.

Paragraph 2: The MCCP requires that the police give the arrested person some preliminary information at the exact moment of arrest. First, the person must be informed of the reasons for the arrest, as required by Article 9(2) of the International Covenant on Civil and Political Rights, Article 5(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7(4) of the American Convention on Human Rights, and Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. As is common in some states, the MCCP also requires that the arrested person be informed of his or her right to silence (see Article 57 and its accompanying commentary). Finally, the arrested person must be informed immediately of his or her right to contact a family member or another appropriate person and his or her counsel. Rule 92 of the United Nations Standard Minimum Rules for the Treatment of Prisoners requires the immediate notification of this right. To facilitate this, some states provide that arrested persons are given standard information when they are arrested by a police officer that may go as follows: “You are being arrested on the suspicion of committing an offense under Article XX of the Model Criminal Code. You have the right to remain silent. You do not have to talk to me if you do not wish to do so. Anything you do say could be used in evidence against you in a court of law. You have the right to contact a family member and your lawyer. If you do not have a lawyer, you have the right to legal assistance of your choice or to be provided with legal assistance if you qualify under the law.”

Paragraph 3(a): This paragraph gives effect to the right to silence and the right to freedom from self-incrimination set out in Article 57 of the MCCP.

Paragraph 3(c): The right to communicate confidentially with counsel is protected under Article 70 of the MCCP and is discussed in detail in the accompanying commentary.

Paragraph 3(d): Reference should be made to Article 71 and its accompanying commentary.

Paragraph 3(e): Principle 16 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that, promptly after arrest, an arrested person be allowed to inform a family member or another appropriate person of his or her arrest. The arrested person should be informed both orally and in writing of this right at the moment of arrest. The police should give an arrested person the opportunity to make telephone contact with a family member if this is feasible. If it is not feasible, the police must ensure that the family is informed of the arrest and the place of detention in some other manner. Family members also need to be informed of any transfers of an arrested person from one detention center to another. Reference should be made to the Model Detention Act.

Paragraph 3(f): Reference should be made to Article 170(5) and Article 171(6), which describe the arrested person’s right to be brought promptly before a judge.

Paragraph 3(g): The right to consular support for arrested persons derives from a number of sources, including the Vienna Convention on Consular Relations (Article 36[a]), the International Convention on the Protection of All Persons from Forced Disappearances, Article 17(2)(d), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 16[2]), and the Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live (Article 10). It is incumbent upon the police to facilitate direct contact between the arrested person and the consular or diplomatic representative. The police must also permit full access by the representative to the arrested person.

Paragraph 3(h): This paragraph requires the police to inform a person about his or her right to challenge the lawfulness of his or her detention at any stage of the proceedings. This right is set out in Chapter 16 and is given effect under Articles 339–345.

Paragraph 3(i): Paragraph 3(i) requires that the arrested person be informed of his or her right to an interpreter. The right to an interpreter is found in Article 59 of the MCCP.

Paragraph 3(j): General Comment no. 20 of the United Nations Human Rights Committee states that the protection of a person from torture or cruel treatment or punishment (contained in Article 58 of the MCCP) requires that the person must have access not only to a lawyer and family members but also to a doctor. This right is also contained in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 24), the United Nations Standard Minimum Rules for the Treatment of Prisoners (Rule 24), and the European Prisons Rules (Rule 29). The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has advocated this “trinity of rights” for arrested and detained persons (see *12th General Report*, CPT/Inf [2002] page 12, paragraph 40) and has further stated that there should be a formal legal recognition of this right. Where an arrested person requests, the police must call a doctor without delay and must not filter such requests (paragraph 42). The arrested person has the right to be fully examined by the doctor. Furthermore, the right of access to a doctor includes the right to a doctor of the person’s choice (e.g., his or her own doctor), if he or she so wishes, or the right to a second medical examination (Principle 25 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment). The examination of the arrested person must take place out of hearing, and preferably out of sight, of police officers (see CPT, *2nd General Report*, CPT/Inf [1992], page 3, paragraph 38). The results of this examination as well as relevant statements of the arrested person and the doctor’s conclusions must be formally recorded and made available to the arrested person and his or her lawyer (Principle 26, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

Paragraphs 4 and 5: Beyond the obligations to provide information regarding the arrested person’s rights under Paragraph 2 at the moment of arrest, additional obligations must be met at a slightly later stage. At that point, the person must be informed of his or her rights both in writing and orally in a language that the person under-

stands. This means that the police should have a standard form that sets out the rights of an arrested person in various languages and is handed to the arrested person once the contents of the form have been read to him or her. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) recommends “that a form setting out those rights in a straightforward manner should be systematically given to persons detained by the police at the very outset of their custody. Further, the persons concerned should be asked to sign a statement attesting that they have been informed of their rights and that such a measure would be easy to implement, inexpensive and effective in protecting an arrested person from any potential incidences of torture or other mistreatment” (European Committee for the Prevention of Torture (CPT) and Inhuman or Degrading Treatment or Punishment 6th General Report, CPT/Inf (1996), page 21, paragraph 16). It is standard practice in many states that an arrested person is asked to sign the custody record verifying that he or she has been provided with a written copy of his or her rights. The right to be informed of a person’s rights is crucial to their realization. Principle 13 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that any person from the moment of arrest be provided by the authorities with information on and an explanation of his or her rights and how to avail himself or herself of those rights. Note that the rights listed in Paragraph 3 also apply during the course of any period of detention, as stipulated in Paragraph 7.

Paragraph 6: As required by Paragraph 2, an arrested person must be informed of the charges against him or her at the exact moment of arrest. Paragraph 6 requires that later on in the arrest procedure, the arrested person be given a written notification of the charges against him or her. This is usually contained in a charge sheet that is presented to an arrested person by the police. The charge sheet does not have to provide a very detailed explanation of the full charges against the arrested person. Such detail is required only when the arrested person is formally accused of the criminal offense at the confirmation hearing under Article 201. At that point, the accused must be informed *in detail* of the charges against him or her. This right is set out in Article 60, which should be referred to for further discussion on its meaning.

Paragraph 7: Reference should be made to Section 2 of the Model Detention Act and its accompanying commentary, which discusses the importance of accurate record keeping at the time of arrest.

Article 173: Questioning of an Arrested Person

The questioning of an arrested person must be conducted in accordance with Articles 106–109.

Article 174: Conditions of Detention of an Arrested Person

The Model Detention Act applies to all persons arrested under the M CCP.

Part 2: Review of Legality of Arrest and Initial Detention Hearing

Article 175: Initial Hearing before a Judge after Arrest

1. The purpose of the initial detention hearing is to review the lawfulness of the arrest and to determine whether there are grounds for detention, bail, or restrictive measures other than detention or bail.
2. The prosecutor, the suspect, and the suspect's defense counsel must be present at the initial detention hearing.
3. At the commencement of the initial hearing, the competent judge must:
 - (a) inform the suspect of the rights to which he or she is entitled during the investigation under Articles 54–71 and Article 172;
 - (b) ensure that the rights of the suspect have been respected, particularly the right to legal assistance under Articles 65–71; and
 - (c) inform the suspect of his or her right to silence and not to incriminate himself or herself during the hearing.
4. The suspect, either personally or through his or her defense counsel, may raise objections before the competent judge concerning any allegations of ill treatment, violations of his or her rights by police or other authorities, or the unlawfulness of his or her arrest or detention.
5. Where the suspect chooses to make a statement, the competent judge, the prosecutor, and the counsel for the suspect may ask pertinent questions of the suspect with respect to his or her statement. The suspect is not obliged to respond to any questions posed by the judge or the prosecutor, if doing so would violate his or her right to freedom from self-incrimination.
6. The competent judge must assess whether the arrest of the suspect was lawful based on information submitted by the prosecutor and the suspect, if he or she chooses to make a statement, personally or through defense counsel.
7. If the arrest is deemed to have been unlawful, the competent judge must order that the suspect be released immediately. The order must be executed immediately. The competent judge must inform the suspect of his or her right

to seek compensation under Chapter 17. The competent judge must notify the office of the prosecutor to investigate the matter.

8. If the arrest is deemed to have been lawful, the arrested person must be released unless the prosecutor submits an application for detention, bail, or restrictive measures other than detention under Article 186.

Commentary

Article 175 gives effect to the arrested person's right to be brought promptly before a judge that is expressed in Article 172(3)(f). Reference should be made to the commentary to Article 170(5) for a discussion on the meaning of this right. Promptly, and within the time frame of seventy-two hours, whether it is on a weekday or weekend, the arrested person must appear before a judge, who is tasked with assessing the lawfulness of the arrest and determining whether the arrested person should be detained, subject to bail, or subject to restrictive measures other than detention or bail. The arrested person and his or her counsel must be present at the hearing. The arrested person may give evidence before the court, but he or she is not obliged to. The judge is required to "ensure" that the arrested person's rights have been respected and must inform the arrested person of all his or her rights. Under Paragraph 6, the arrested person must be given the opportunity to make allegations of mistreatment or unlawfulness of arrest or detention. The European Committee for the Prevention of Torture (CPT) recommends that the judge record any allegations of mistreatment in writing and order immediately a forensic medical examination and take the necessary steps to ensure that the allegations are properly investigated (*12th General Report*, CPT/Inf [2002], page 14, paragraph 45). This should be done even where the person does not bear visible external injuries.

After assessing all the evidence, both from the prosecutor and from the arrested person, the judge must either confirm the arrest or deem the arrest to be unlawful. In assessing the lawfulness of arrest, similar factors to those outlined in the commentary to Articles 169 and 177 apply. Thus, the judge must assess all the circumstances surrounding the arrest, including compliance with the procedural requirements of the applicable law but also the probable cause that underpinned the arrest and the legitimacy of the purpose of the arrest.

Paragraph 4: Principle 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that when an arrested person is brought before the judge, he or she must be given the opportunity to make a statement on the treatment received by him or her while in custody.

Part 3: Detention, Bail, and Restrictive Measures Other Than Detention

Section 1: General Provision

Article 176: Detention, Bail, and Restrictive Measures Other Than Detention

The following warrants may be made against a suspect or an accused:

- (a) a warrant for detention or continued detention;
- (b) a warrant for bail; or
- (c) a warrant for restrictive measures other than detention.

Commentary

The general rule is that a person must be afforded his or her personal liberty and not be held in detention pending trial. General Comment no. 8 of the United Nations Human Rights Committee states that “[p]re-trial detention should be an exception and as short as possible” (paragraph 3). In some cases, a suspect will not have been arrested. In other cases, an arrested person will have been released under Article 175 and will be at liberty pending trial. In exceptional circumstances, and only as provided for in Chapter 9, Part 3, a person may be subject to a restriction on his or her personal liberty or other restrictive measures. These measures must always be applied for by a motion of the prosecutor and should be determined by a judge at a hearing. A written warrant from a judge is necessary before any of the measures contained in Article 176 can be undertaken.

Section 2: Detention

Article 177: Grounds for Detention

1. Except as otherwise provided for in the MCCP or the applicable law, a warrant of the competent judge is necessary for the detention to be valid.
2. Detention may be ordered against an arrested person only where there is probable cause that:
 - (a) the suspect will flee to avoid criminal proceedings;
 - (b) the suspect will destroy, hide, taint, or falsify evidence of a criminal offense or pressure, manipulate, or otherwise influence a witness, a victim, or an accomplice;
 - (c) the suspect will commit a criminal offense, repeat a criminal offense, complete an attempted criminal offense, or commit a criminal offense that he or she has threatened, if released. In considering this ground, the seriousness of the criminal offense of which the person is suspected, the manner or circumstances in which it was committed, and the suspect's personal characteristics, past conduct, the environment and conditions in which he or she lives, and other personal circumstances must be taken into account to ascertain this risk; or
 - (d) public safety may be endangered if the suspect remains free.

Commentary

Paragraph 1: Principle 37 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires a written warrant of a judge for police to lawfully detain a person. Where a person is under detention without a written warrant for detention, he or she must be released immediately.

Paragraph 2: Detention is a measure of last resort. According to Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, “except in special cases provided by law,” a person is entitled to release pending trial subject to conditions that may be imposed in accordance with the law. Paragraph 2 provides a list of circumstances that would justify the detention of a suspect. In all cases, there must be probable cause (see Article 1[22] and its accompanying commentary for the definition of probable cause). The grounds set out in Paragraph 2 were arrived at after a survey of criminal legislation in states around the world and the conditions under which they sanction pretrial detention. These grounds have also

been scrutinized by international human rights bodies. The first ground for pretrial detention is found in Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the case of *Yağci and Sargin v. Turkey*, the European Court held that in determining the risk of flight, the court must look not only at the seriousness of the criminal offense but also at “a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial” (*Yağci and Sargin v. Turkey*, application no. 16419/90;16426/90 [1995], ECHR 20 [June 8, 1995], paragraph 52). The ground for detention provided for in Paragraph 2(b) has been recognized by the European Court of Human Rights (see *Tomasi v. France*, application no. 12850/87 [1992], ECHR 53 [August 27, 1992], paragraphs 92–95), as has the risk of a person reoffending as set out in Paragraph 2(c) (see *Toth v. Austria*, application no. 11894/85 [1991], ECHR 72 [December 12, 1991], paragraphs 69–70). The final ground justifying pretrial detention on the basis of public safety is similar to the public order ground recognized by the European Court in *Tomasi v. France* (paragraph 91). The court found this ground to be an exceptional measure that can be employed only where there are concrete facts that the person’s release would prejudice public order. Furthermore, the court held that continued detention is permissible only where the public order continues to be threatened.

Article 178: Conditions of Detention

The Model Detention Act applies to a person detained under the MCCP.

Commentary

Article 178 relates to detainees as defined in Article 1(12), whereas Article 174 (which is similar in wording) relates to an arrested person as defined in Article 1(4).

Section 3: Bail

Article 179: Grounds for Bail

Bail may be granted where:

- (a) probable cause exists that a suspect or accused has committed a criminal offense;

- (b) the only basis for the detention of the person is a fear that the person may flee; and
- (c) the person has promised that he or she will not go into hiding or leave his or her place of current residence without permission.

Commentary

Article 9(3) of the International Covenant on Civil and Political Rights provides that release from detention may be conditioned by guarantees to appear for trial. This provision is also contained in Article 7(5) of the American Convention on Human Rights. As an alternative to detention, and as a means of ensuring the appearance of the accused at trial, a court may make the release of a suspect pending trial dependent upon the provision of bail. This is common practice in many states around the world. Under the MCCP, bail may be used as an alternative to pretrial detention where the court finds that the only possible ground upon which to detain the person is that there is a risk of flight. Given that pretrial detention should be a measure of last resort, the court should give serious consideration to whether bail is a viable option as opposed to detention in such a circumstance.

Article 180: Provision of Bail

1. Bail may be provided by the suspect or the accused. Bail may also be provided by a third party in the form of personal liability under Paragraph 3(e).
2. Bail consists of an amount of money determined in relation to the gravity of the criminal offense, the personal and family conditions of the suspect or the accused, and the material position of the person who gives bail. Where bail is posted by a third party under Paragraph 3(e), the court must examine the relationship of the suspect or the accused with the person providing the security.
3. Bail may be provided in:
 - (a) cash;
 - (b) securities;
 - (c) valuable objects and other movable objects of high value that may be readily converted into cash and deposited for safekeeping;
 - (d) a mortgage for the amount of bail on the real estate of the person who gives the bail; or

- (e) the form of personal liability of one or more persons who undertake to pay the amount of bail in case the suspect or accused flees.
- 4. The person posting bail must submit evidence to the competent court about his or her material position or the origin, ownership, or possession of any property posted as bail.

Commentary

The factors set out in Paragraph 2 are derived in part from the case law of the European Court of Human Rights. Bail is not a punitive sanction. The purpose in assigning a specific monetary value is to guarantee the accused's presence at trial. In the case of *Neumeister v. Austria* (application no. 1936/63 [1968], ECHR 1 [June 27, 1968]), the European Court held that "[t]he guarantee provided for by that Article (Article 5[3]) [of the European Convention] is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing. Its amount must therefore be assessed principally by reference to him, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond" (paragraph 14). Bail should be deposited with the registry (see the commentary to Article 23 of the M CCP).

Article 181: Consequences of a Breach of a Warrant for Bail

1. The suspect or the accused, and the person posting bail, if different, must be informed of the consequences of noncompliance with a warrant for bail prior to it being issued by the competent court.
2. Where the suspect or the accused flees, the amount or the items posted as bail must be credited to the budget of [insert name of state].

Commentary

Where a person breaches a bail warrant, he or she forfeits whatever money or security was deposited with the court. Where a third party has undertaken to pay bail, he or she must pay this amount.

Article 182: Cancellation of a Warrant for Bail during Criminal Proceedings

1. The warrant for bail must be cancelled and a detention warrant for the suspect or the accused must be made by the competent court where:
 - (a) the suspect or the accused, after being summonsed under Article 28 or 29, fails to appear before the court or to justify his or her nonappearance;
 - (b) the suspect or the accused prepares to flee; or
 - (c) another ground for detention under Article 177(2) arises.
2. The suspect or the accused must be informed by the competent court of the grounds for cancellation of a warrant for bail prior to it being issued by the court.
3. Where the warrant for bail is cancelled, the money or items posted as bail must be returned or, if a mortgage was posted as bail, the mortgage must be removed.

Commentary

The cancellation of a bail warrant, under Article 182 in contrast to its breach under Article 181 where the suspect or accused flees, results in the return of whatever monies or securities were deposited with the court. It also results in the court issuing a detention warrant instead. The latter occurs only where the suspect or the accused casts doubt upon the sufficiency of bail as a measure to secure his or her appearance in court, for example, where he or she fails to appear at a pretrial hearing or he or she prepares to flee. In other instances, other grounds of detention, such as the potential for interference with witnesses or evidence, may come to light and the court may determine that the suspect or accused should be detained.

Article 183: Cancellation of a Warrant for Bail after the Completion of Criminal Proceedings

The warrant for bail must be cancelled when an investigation is discontinued under Article 98 or where criminal proceedings are terminated by way of a final judg-

ment. Where a penalty of imprisonment is imposed upon a convicted person, bail must be cancelled only after he or she has started to serve his or her term of imprisonment.

Section 4: Restrictive Measures Other Than Detention

Article 184: Restrictive Measures Other Than Detention

1. As an alternative to detention or bail, or in addition to bail, restrictive measures other than detention may be ordered against a suspect or an accused.
2. Restrictive measures include:
 - (a) house arrest of the suspect or the accused, alone or in the custody of another person;
 - (b) a regime of periodic visits of the suspect to an agency or authority designated by the competent judge;
 - (c) the prohibition of the suspect or the accused from leaving a particular area designated by the competent judge;
 - (d) the prohibition of the suspect or the accused from appearing at identified places or meeting a named individual(s);
 - (e) the confiscation of the passport of the suspect or the accused; or
 - (f) the prohibition of the suspect or the accused from staying in the family home, if the person is suspected or accused of domestic violence under Article 105 of the MCC.
3. Restrictive measures other than detention may be ordered upon the application of the prosecutor or by a competent judge, of his or her own motion.
4. Restrictive measures other than detention may be ordered only where there is a probable cause that restrictive measures are necessary to ensure:
 - (a) the presence of the suspect or the accused at trial;
 - (b) the integrity of evidence related to the alleged criminal offense; or
 - (c) the safety or security of a victim, a witness, and another person related to the proceedings.

Commentary

In lieu of detention or bail, or in addition to bail, the MCCP provides a list of restrictive measures that may be imposed upon a suspect or an accused. Unlike bail, which can be employed only where there is a risk of flight, restrictive measures may be employed as a less restrictive means to ensure the integrity of evidence or the safety of victims, witnesses, and other persons. In the latter case, restrictive measures may confine the suspect or the accused to a specified location (e.g., his or her home, an institution, or a specified geographical area), restrict his or her access to a location (e.g., the family home), or prohibit the suspect or the accused from appearing at an identified place or meeting with identified persons. In terms of securing the suspect's or the accused's presence at trial, a regime of periodic visits to an agency or authority appointed by the court or the confiscation of his or her passport may suffice instead of detention or bail. The competent judge must give due regard to the restrictive measures contained in Article 184 as an alternative to detention or bail. If restrictive measures are chosen, the judge should choose the options that are most necessary and proportionate in the circumstances.

Section 5: Initial Procedure for Seeking Detention, Bail, or Restrictive Measures Other Than Detention

Article 185: Prosecutorial Applications for Detention, Bail, or Restrictive Measures Other Than Detention

1. The prosecutor may file an oral application for detention, bail, or restrictive measures other than detention at the initial hearing before a competent judge under Article 175.
2. The prosecutor may also file a written application for detention, bail, or restrictive measures other than detention at any other time.

Commentary

Detention should not be viewed as an automatic consequence of a person being arrested. In order for a person to be detained past the initial seventy-two hour limit set out in Article 170(5) and Article 171(6), the MCCP provides that a detention warrant must be obtained from a judge. The prosecutor may file a motion for detention that

can be heard in the course of the initial hearing before the judge under Article 175. In some cases, the prosecutor may not file a motion for detention of an arrested person at the time of the initial hearing; the need to detain the person may arise later, and the prosecutor may then file a motion that will be heard in a separate hearing under Article 186.

Bail and restrictive measures other than detention also require the filing of a motion, followed by a hearing and a warrant issued by a competent judge. Like a motion for detention, a motion for bail or restrictive measures may be heard at the initial hearing under Article 175 or a motion may be filed subsequently and dealt with in a separate hearing under Article 186.

Article 186: Determination of an Application for Detention, Bail, or Restrictive Measures Other Than Detention at the Initial Hearing under Article 175

1. Where the prosecutor makes an oral application for detention, bail, or restrictive measures other than detention under Article 186, he or she must submit the written decision to initiate the investigation, along with any other evidence supporting his or her request for detention, bail, or restrictive measures.
2. The burden of proof is on the prosecutor to prove that continued detention, bail, or restrictive measures are necessary on the grounds set out in Articles 177, 179, and 184, respectively.
3. The standard of proof at the hearing is the balance of probabilities.
4. Upon hearing the submission of the prosecutor and any statement by the suspect, the competent judge may:
 - (a) where an application for detention has been filed, order the detention of the suspect where the grounds set out in Article 177(2) are found to exist on the balance of probabilities;
 - (b) where an application for detention has been filed, order the release of the suspect, where the grounds that are alleged under Article 177(2) are not found on the balance of probabilities;
 - (c) where an application for bail has been filed, order bail where the grounds set out in Article 179 are found to exist on the balance of probabilities;

- (d) where an application for bail has been filed, order the release of the suspect without bail where the grounds set out in Article 179 are found not to exist on the balance of probabilities or where bail is determined to be unnecessary to secure the presence of the accused at trial;
 - (e) where an application for restrictive measures has been filed, order restrictive measures other than detention where one of the grounds set out in Article 184(4) are found to exist on the balance of probabilities; or
 - (f) where an application for restrictive measures has been filed, order the release of the suspect without restrictive measures where the grounds set out in Article 184(4) are found not to exist on the balance of probabilities or where restrictive measures are determined to be unnecessary.
5. Where the competent judge orders the release of the suspect, the order must be executed immediately.
 6. Where the competent judge makes a warrant for detention, bail, or restrictive measures other than detention, the judge must inform the suspect of his or her right to appeal the warrant under Article 192.
 7. Where the competent judge makes a warrant for detention, bail, or restrictive measures other than detention, a written and reasoned decision must be issued by the competent judge within forty-eight hours of the conclusion of the hearing.
 8. The warrant for detention, bail, or restrictive measures other than detention and the accompanying decision must be served upon the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 29.
 9. A warrant for restrictive measures other than detention, with the exception of house arrest under Article 170(2)(a), may be made for any period of time up until the final judgment.
 10. A warrant for bail may be made for any period of time up until the time the accused person is convicted, and subsequently imprisoned, or until the accused person is found to be not criminally responsible for the offense alleged.
 11. A warrant for detention or a warrant for the restrictive measure of house arrest under Article 170(2)(a) is valid for three months from the date the detainee was arrested. After three months, the warrant will expire and the suspect or the accused must be released or the prosecutor must seek another warrant for continued detention or a warrant for continuation of house arrest under Article 174.
 12. Where the prosecutor discontinues an investigation against a suspect or an accused who is subject to a warrant for detention, bail, or restrictive measures, the prosecutor must inform the competent judge who issued in the war-

rant in writing within twenty-four hours. The competent judge must cancel the warrant for detention, bail, or restrictive measures within twenty-four hours of receiving this notification, and the warrant must be executed immediately.

13. At any time outside of a hearing on detention, the competent judge may of his or her own accord terminate a warrant for detention or a warrant for restrictive measures where the grounds for detention set out in Article 177(2) are no longer valid or the grounds set out in Article 184(4) for restrictive measures are no longer valid.
14. Termination of the warrant for detention or the warrant for restrictive measures may be done only with the consent of the prosecutor, except as provided for in Paragraph 15.
15. Where the competent judge and the prosecutor cannot reach agreement on the issue of termination of the warrant for detention or restrictive measures, the competent judge must request the appeals court to rule on the matter.
16. The appeals court must make a ruling within forty-eight hours of receiving the request from the competent judge.

Commentary

At the initial hearing before a judge under Article 175, the judge will determine the legality of the arrest. During the course of the hearing, the prosecutor may indicate to the judge that he or she wishes to make an oral application for detention, bail, or restrictive measures other than detention. Where the prosecutor seeks to make such an oral application, the competent judge must hear the application during the same hearing. The prosecutor must submit to the competent judge his or her decision to initiate an investigation and then prove to the judge that the grounds for detention set out in Article 56 exist. The fact that the burden is on the prosecutor to prove the grounds of detention is consistent with the presumption of innocence of the suspect set out in Article 59. The standard of proof applicable at the hearing is that of the “balance of probabilities.” It is a lesser standard than the “beyond reasonable doubt” standard set out in Article 216 that applies to the final determination of the criminal responsibility of the accused person. The balance of probabilities standard is sometimes called the “preponderance of evidence.”

Once the prosecutor and the suspect and his or her counsel have had the opportunity to make submissions to the court, the judge must issue the warrant for detention, bail, or restrictive measures other than detention or order the release of the suspect pending trial. A written decision should be issued after the conclusion of the hearing. This decision will be important if the suspect wishes to appeal it under Article 192.

A warrant for bail will be effective until the accused is either imprisoned or released pursuant to a finding that he or she is not criminally responsible for the offenses charged. A warrant for restrictive measures, except for house arrest (which follows the

same rules and principles applicable to detention), can last the duration of trial and until the final determination of the case. A warrant for detention and a warrant for house arrest, in contrast, are temporary measures (three months in duration) that must be renewed and reordered in order to make them effective. The issue of pretrial detention in post-conflict states was discussed extensively by the Model Codes drafters. In the past, illegal pretrial detention, or detention of persons beyond the legal limitations of a detention warrant, has been a huge problem in post-conflict states. People have been left in detention for long periods of time awaiting trial. Where there is no periodic review of detention by a judge, or no time limits on the detention warrant, this can lead to violation of the right to trial within a reasonable time set out in Article 63, and the associated right to trial without undue delay also in Article 63. By providing that detention warrants are temporary and by placing the onus on the prosecutor to renew the detention warrant, the drafters sought to address the problem of excessive pretrial detention.

Paragraph 8: Principle 11 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment requires that a warrant for detention and the reasons for detention must be communicated fully and promptly to the detained person.

Article 187: Application for Detention, Bail, or Restrictive Measures Other Than Detention Other Than at the Initial Detention Hearing

1. The prosecutor may file a written application for detention, bail, or restrictive measures other than detention at any time with the registry of the competent trial court.
2. Upon receipt of the application, the registry must forward the application to the competent judge.
3. The competent judge must schedule a time and date for a hearing.
4. Notice of the hearing must be served upon the prosecutor, the suspect or the accused, and his or her counsel in accordance with Article 27.
5. The provisions of Article 175 apply, with the necessary modifications, to a hearing on a written application for detention, bail, or restrictive measures other than detention.

Commentary

If, subsequent to the initial hearing where the suspect has been released without bail or other restrictive measures, the prosecutor believes that grounds for detention, bail, or restrictive measures have arisen, he or she may file a written application. The application will be heard at a separate hearing in the presence of the competent judge, the prosecutor, the suspect or the accused, and his or her lawyer. The hearing will be run in exactly the same way as the hearing of an oral application at the initial hearing (see Article 186).

Section 6: Procedure for Seeking Continued Detention or Continued House Arrest of a Suspect or an Accused

Article 188: Hearing on Continued Detention or Continued House Arrest

1. The suspect or the accused may be detained or held under house arrest after the expiration of a three-month warrant only when a warrant for continued detention or continued house arrest is obtained.
2. Continued detention or continued house arrest may be ordered only where the prosecutor demonstrates that:
 - (a) grounds for detention under Article 177(2) exist; or
 - (b) one of the grounds for house arrest under Article 184(4) exist; and
 - (c) all reasonable steps are being taken to speedily conduct the investigation.
3. The prosecutor must file a written application for continued detention or continued house arrest of a suspect with the competent trial court prior to the expiration of the previous detention warrant.
4. The competent judge must schedule a hearing on the application for continued detention or continued house arrest prior to the expiration of the warrant for detention or warrant for house arrest. The prosecutor and the suspect or the accused must be notified of the hearing in accordance with Article 29.
5. Article 186(3)–(16) applies, with the necessary modifications, to a hearing on continued detention or continued house arrest.
6. A warrant for continued detention or continued house arrest is valid for three months after the date of the hearing on continued detention or continued

house arrest. After three months, the warrant for continued detention or continued house arrest will expire and the suspect or the accused must be released or the prosecutor must seek another warrant for continued detention or continued house arrest under Article 187.

Commentary

As discussed in the commentary to Article 186, the detention of a suspect or accused will expire after three months. The purpose of Article 188 is to ensure that there is continual review of and oversight over detention. This is in line with Principle 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which provides that a judicial authority “shall keep the necessity of detention under review.” A number of post-conflict states have been criticized for their failure to provide for continuing review of detention. For example, the Organization for Security and Cooperation in Europe’s Legal Systems Monitoring Section (LSMS) in Kosovo criticized the United Nations Mission in Kosovo (which was charged with the power to make and administer criminal law) for its failure to amend the law to provide for periodic review of detention.

Section 7: Time Limits for Detention or House Arrest and Procedure for Seeking an Extension of Time Limits

Article 189: Time Limits for Detention or House Arrest

1. A suspect or an accused may be kept in pretrial detention or pretrial house arrest for no longer than is necessary to undertake an effective investigation of the criminal offense and to present an indictment under Article 195. The investigation must be concluded within a reasonable time, taking into account the complexities of the case and the conduct of the parties.
2. Except as provided for in Article 190, the maximum period of detention of a suspect or an accused prior to the presentation of an indictment under Article 195 is twelve months from the date of the suspect’s arrest.
3. Except as provided for in Article 190, the maximum period of detention of a suspect or an accused after the presentation of the indictment under Article 195 until the date of the commencement of the trial is twelve months.

4. The two-year maximum period of pretrial detention may be extended under Article 190.

Commentary

A detained person has the right to a trial within a reasonable time or release pending trial. There is no objective standard as to what constitutes a reasonable time (see the commentary accompanying Article 63). Many criminal procedure codes around the world do not provide for a maximum period of pretrial detention. In some instances, this can lead to persons being detained for longer than the potential maximum penalty of the offense for which they are charged. This is the reason why the drafters of the MCCP decided to provide an upper limit on the time a suspect or an accused may spend in pretrial detention.

Article 190: Procedure for Extending the Time Limits for Detention or House Arrest

1. The prosecutor may apply to the judge administrator of the competent trial court for an extension of the maximum period of the preindictment detention or house arrest.
2. The prosecutor must file a written application for the extension of the maximum period of detention or house arrest with the judge administrator of the competent trial court prior to the expiration of the previous warrant for continued detention.
3. The judge administrator must schedule a hearing on the written application of the prosecutor for the extension of the maximum period of detention or house arrest. The prosecutor and the suspect or the accused must be notified of the hearing in accordance with Article 29.
4. The provisions of Article 186, with the necessary modifications, apply to a hearing on the extension of the maximum period of detention or house arrest.
5. The maximum period of detention or house arrest may be extended for up to twelve months only where:
 - (a) exigent circumstances exist; and
 - (b) the failure to present the indictment within twelve months from the date of the suspect's arrest or to commence the trial within twelve months after the confirmation of the indictment is due to the complexity of the

case or to other factors not attributable to the prosecutor or the competent judge.

6. The burden of proof is on the prosecutor to prove that the extension of the maximum period of detention or house arrest is necessary on the grounds set out in Paragraph 5.
7. The standard of proof at the hearing is the balance of probabilities.
8. Where the judge administrator finds that the grounds set out in Paragraph 5 have not been proven on the balance of probabilities, he or she must order the release of the suspect upon the expiration of the previous warrant for continued detention.
9. Where the judge administrator finds that the grounds set out in Paragraph 5 have been proven on the balance of probabilities, he or she may make a warrant for the extension of the maximum period of detention. The exact length of detention must be specified in the warrant.
10. The detention of a person subject to a warrant for the extension of the maximum period of imprisonment does not affect the application of Article 187. The prosecutor must apply for the continued detention of the suspect or the accused every three months under Article 187.
11. Where the judge administrator makes a warrant for extension of the maximum period of detention, he or she must inform the suspect of his or her right to appeal the warrant under Article 192.
12. Where the judge administrator makes a warrant for extension of the maximum period of imprisonment, a written and reasoned decision must be issued by him or her within forty-eight hours of the conclusion of the hearing.
13. The decision must be served upon the prosecutor and upon the suspect or the accused and his or her counsel in accordance with Article 29.

Commentary

The prosecutor's application for extension of the time limit for detention and house arrest proceeds in much the same way as an application for detention or continued detention. A hearing must be called with the suspect or accused and his or her counsel present, and the prosecutor must make a case for the extension of the time limits based on the existence of "exigent circumstances." As an additional criterion, the prosecutor must convince the court, on the balance of probabilities, that the failure to present an indictment or commence the trial before the expiration of the legal time limits is due to factors beyond the control of the prosecutor, for example, where a case involves a number of alleged complex transnational organized criminal activities.

Where the judge orders that a person may be detained beyond the expiration of the time limit, the detention must be renewed at three-month intervals upon the application of the prosecutor. If, after the expiration of another twelve months, the trial has not commenced, the detainee must be set free pending trial. If, upon hearing the application for the extension of the period of detention, the judge determines that the criteria set out in Paragraph 5 have not been proven, the detained person must be released pending trial.

Section 8: Detention and House Arrest after the Presentation of the Indictment and during the Trial

Article 191: Competent Judges to Hear Detention Issues after the Confirmation of the Indictment and during the Trial

1. After the indictment has been confirmed, the presiding judge assigned to hear the trial must review the detention or house arrest of the accused person as provided for in the MCCP.
2. It is the duty of the presiding judge to review the necessity of continued detention or continued house arrest. The prosecutor is not required to file a written application for continued detention or continued house arrest under Article 187.
3. The provisions of Article 186, with the necessary modifications, apply to the review of continued detention or continued house arrest during the trial.

Commentary

Prior to the confirmation hearing, in order to continue to detain or subject a person to house arrest, the prosecutor must file an application with the court and a hearing must be called in accordance with Article 188. This hearing is conducted by a judge assigned to hear the application (under the MCCP there is no one pretrial judge; individual trial court judges are randomly selected to hear matters relating to pretrial proceedings). Once the indictment has been confirmed under Article 201, either a single judge or a panel of judges will be selected to hear the trial. From this point on, the single judge or the presiding judge will be responsible for overseeing the continued detention or continued house arrest of an accused person.

The validity of continued detention or continued house arrest will have been decided upon at the confirmation hearing as required under Article 201. Article 202 requires that the trial must take place within a month. Thus, the first-time detention or house arrest will need to be reviewed by the single judge or the presiding judge of the panel during the trial three months after the confirmation hearing and every three months thereafter. Because the trial is ongoing and the prosecutor and the defense will be present during it, the requirement that the prosecutor file an application for continued detention or continued house arrest with the court and that there is a separate detention hearing is dispensed with per Paragraph 2. It is the duty of the presiding judge, at intervals of three months, to review the necessity for detention or continued detention.

Section 9: Appeals Relating to Detention, Continued Detention, or Restrictive Measures Other Than Detention

Article 192: Appeal of Orders for Detention, Continued Detention, or Restrictive Measures Other Than Detention

1. The defense may, under Article 295, appeal:
 - (a) a warrant for detention;
 - (b) a warrant for continued detention; and
 - (c) a warrant for restrictive measures other than detention.
2. The prosecutor may appeal a decision of the court to refuse a warrant for detention, continued detention, or restrictive measures under Article 295.

Commentary

An interlocutory appeal of the granting or the refusal to grant a warrant for detention, continued detention, or restrictive measures other than detention is permissible under the M CCP (see Articles 295–297 and their accompanying commentaries that set out the procedure to be followed in making such an appeal).

Chapter 10: Indictment, Disclosure of Evidence, and Pretrial Motions

Part 1: The Indictment

Article 193: Joinder of Accused Persons

Persons accused of the same or different criminal offenses committed in the course of the same transaction may be charged jointly in one indictment.

Commentary

The joinder of accused persons in an indictment, or “party joinder” as it is sometimes called, is almost universally provided for in domestic criminal procedure laws. It allows the prosecutor, upon the consent of the competent judge, to file one indictment against one or more persons for related offenses. The practical effect is that the persons are tried jointly. This is a valuable tool to promote judicial economy because it saves the prosecutor from having to present the same or closely related evidence at a number of different trials. It also saves the court time and prevents witnesses from having to undergo the trauma of testifying at different trials. Joinder of persons accused of “the same or different” criminal offenses is permissible where there is some relationship between the alleged criminal offenses. In Article 193, the standard used is whether the persons committed the offenses “in the course of the same transaction.” The term “transaction” as defined in Rule 2 of the International Criminal Tribunal for the former Yugoslavia Rules of Procedure and Evidence is “a number of acts or omissions whether occurring in one event or a number of events at the same or different locations and being part of a common scheme, strategy or plan.” There is no need for the acts or omissions to have been carried out at the same time. This standard is used in many countries around the world. It implies that there is a logical relationship—known as “connexité,” or the “nexus requirement” in some states—between the criminal offenses committed by the accused persons. After the accused persons have been jointly indicted and are on trial, the trial court may order that they be tried separately if the requirements of Article 219 are met.

Article 194: Joinder of Criminal Offenses

Two or more criminal offenses must be joined in one indictment if the series of acts committed together form the same transaction and the criminal offenses were alleged to have been committed by the same person.

Commentary

The joinder of criminal offenses means that all offenses alleged will be tried at one trial rather than at different trials. This is standard practice around the world and has many of the same advantages that joinder of accused persons has. The criterion for joining criminal offenses is the same as that for joinder of accused persons, namely, that the offenses joined in the indictment form the same transaction. The criminal offenses do not have to occur at the same time and place, although this will be indicative of offenses that formed part of the same transaction.

Part 2: Presentation and Confirmation of an Indictment and Disclosure of Evidence prior to the Confirmation Hearing

General Commentary

There are many different models around the world for the presentation and confirmation of an indictment against a person, and the mechanism may differ in a domestic setting depending on the seriousness of the offense of which a person is accused. In less serious cases, a judge may not be required to confirm the charges. The charges may be brought by the police, the prosecutor, or the investigating judge. In more serious cases, the indictment usually needs to be reviewed by a court before the prosecutor can proceed to trial. The court may make the final decision; in some systems, this decision is made by a grand jury. The purpose of examining the indictment pretrial is to ensure that there is sufficient evidence against the accused person to merit a trial taking place. Where there is insufficient evidence, the indictment will be rejected and the suspect (as defined in Article 1[43]) will not become an accused (as defined in Article 1[1]) and will not be tried under the indictment presented to the court.

In some systems, the review of the indictment may be a “paper review.” In many legal systems, however, the review is done at a hearing. The nature of the hearing and the depth of inquiry into the evidence vary from state to state. In some states, only the prosecutor and relevant witnesses may be present. The defense is not allowed to be present or to present evidence. In other systems, the defense may be present and may refute evidence introduced by the prosecutor but may not bring evidence itself or call its own witnesses. In yet other systems, both the prosecutor and the defense may be present and both may bring evidence before the court, including witnesses.

The indictment facilitates the right of the suspect to be informed in detail of the charges against him or her, a right provided for under Article 60 of the MCPP.

Under Article 201 of the MCPP, the indictment must be examined by a single judge at a confirmation hearing. Prior to this, the indictment must be formally presented to the court (Article 195) and then forwarded to the defense, who can file a response to the indictment in advance of the hearing. Where the suspect has not waived the right to a confirmation hearing, the competent judge will set a time and date for the hearing and both parties may be present. At the confirmation hearing, the prosecutor presents relevant evidence and witnesses in order to prove that on the balance of probabilities the suspect committed the criminal offenses charged in the indictment. The confirmation hearing is not a mini trial; it is not an adversarial proceeding. The prosecutor plays the main role in presenting evidence, although the suspect may make a statement to the court.

Article 195: Presentation of an Indictment

1. A prosecutor may present a written indictment of the suspect to the competent trial court.
2. The indictment must be filed with the registry of the competent trial court.
3. The written indictment must include:
 - (a) the first name, surname, date of birth, place of birth, nationality, and address of the suspect;
 - (b) a statement identifying the provisions of the applicable law that the suspect is alleged to have violated;
 - (c) the alleged time and place of commission of the criminal offense;
 - (d) a complete and accurate description of the legal elements constituting the criminal offense the suspect is accused of;
 - (e) a concise statement of the facts upon which the accusation is made; and
 - (f) a request for the trial of the suspect.
4. In addition to the indictment, the prosecutor must file a list describing the evidence that supports the indictment with the registry of the competent trial court.

Commentary

Once the prosecutor has completed the investigation of the suspect, and when the prosecutor has gathered sufficient evidence to meet the burden of proof required at the confirmation hearing, he or she will present an indictment to the court. In some states, this is known as “preferring an indictment.”

Article 196: Receipt of an Indictment by the Court and Notification of the Suspect

1. Upon receipt of the indictment by the registry, the indictment and the list of supporting evidence under Article 197(1) must be forwarded by the registry to the competent judge.

2. Where the competent judge finds that the indictment does not comply with the provisions of Article 195(3), he or she must return the indictment to the prosecutor to amend the indictment.
3. The prosecutor must amend the indictment within three days and submit the amended indictment to the registry, which must then forward the indictment to the competent judge.
4. The registry must ensure that notification of the indictment is promptly served upon the suspect in accordance with Article 27.
5. The notification must:
 - (a) state that an indictment against the person has been presented to the trial court;
 - (b) state the name of the competent trial court at which the indictment was filed;
 - (c) state the date upon which the indictment was received by the registry of the trial court;
 - (d) inform the suspect and his or her counsel, if any, that the defense has the right to submit a response to the indictment within eight working days of receipt of the indictment; and
 - (e) inform the suspect and his or her counsel, if any, that the defense can waive the right to a confirmation hearing within eight working days of receipt of the indictment.
6. The notification of the indictment must be accompanied by a copy of the indictment.

Article 197: Disclosure of Evidence to the Defense prior to the Confirmation Hearing

1. The registry of the trial court must forward the following to the suspect in addition to the notification of the indictment and the indictment itself under Article 196:
 - (a) a copy of the list of evidence supporting the indictment;
 - (b) copies of prior statements made by witnesses and submitted to the competent judge by the prosecutor. Prior statements may be redacted, and any information that may lead to the identification of a witness deleted,

if a witness is subject to a protective measure order or order for witness anonymity that precludes the identity of the witness being disclosed to the defense; and

- (c) copies and records of any statements made by the accused person to the police or the prosecutor.
- 2. Any new evidence or witness statements that will be used in the confirmation hearing that were not forwarded to the suspect at the time of the notification of the indictment under Paragraph 1 must be forwarded to the registry of the competent trial court and subsequently served upon the suspect in accordance with Article 27.

Article 198: Response to the Indictment by the Suspect

- 1. The defense may file a response to the indictment with the registry of the competent trial court within eight working days.
- 2. The response to the indictment may include written objections to the indictment, legal and factual observations with respect to the indictment, and any preliminary motions the defense wishes to raise under Article 212.

Article 199: Waiver of the Right to a Confirmation Hearing

- 1. The suspect may waive his or her right to a confirmation hearing.
- 2. Where the suspect waives his or her right to a confirmation hearing, the case must proceed to trial without a confirmation hearing if the competent judge finds on the basis of the evidence before him or her that probable cause exists that the suspect committed the criminal offenses set out in the indictment.
- 3. Where the suspect chooses to waive his or her right to a confirmation hearing, he or she must submit a written request to the competent judge explicitly waiving the right within eight working days of receipt of the indictment.

4. The competent judge must issue a written decision not to hold a confirmation hearing upon the request of the suspect if the competent judge is satisfied, by the written request, that the suspect understands the right to be present at the hearing and the consequences of waiving this right.
5. The competent judge must immediately inform the prosecutor of his or her decision not to hold a confirmation hearing at the request of the suspect and serve a copy of the written decision not to hold a confirmation hearing upon the prosecutor in accordance with Article 27.
6. If the request by the suspect for waiver of the confirmation hearing is rejected, the competent judge must set a time and date for the confirmation hearing.
7. Where the suspect has waived his or her right to a confirmation hearing, the competent judge must automatically confirm the indictment.

Commentary

The suspect may choose to go straight to trial rather than have a confirmation hearing. This occurs usually where the suspect does not contest the evidence against him or her. Where the suspect submits a request for waiver of the confirmation hearing, the judge must, nonetheless, conduct a review of the evidence against the suspect under Paragraph 2 to ascertain whether sufficient evidence against the suspect exists. Where the judge nullifies the request for waiver, the confirmation hearing will proceed and the prosecutor will be required to bring additional evidence to meet the burden of proof.

Article 200: Amendment of an Indictment prior to the Confirmation Hearing

1. Prior to the commencement of the confirmation hearing, the prosecutor may amend the indictment without the leave of the competent judge.
2. Where the prosecutor amends the indictment, the newly amended indictment must be filed with the registry of the competent court.
3. The newly amended indictment must be served upon the suspect and his or her counsel in accordance with Article 27.
4. Where the indictment is amended before the confirmation hearing, the suspect may file a motion at trial under Article 212 for a delay in proceedings to prepare his or her defense with respect to any new matters alleged.

Commentary

Before the indictment has been officially confirmed by the court at the confirmation hearing, the prosecutor may substantively amend it, even after it has been presented to the court. The defense must receive a copy of the newly amended indictment as soon as possible. Not only that, the defense must be given adequate time to study the new indictment and prepare for the confirmation hearing. Where the prosecutor amends the indictment close to the confirmation hearing, the defense may seek to delay the date of the hearing under Article 201. Once the indictment has been confirmed and the trial is pending, the prosecutor cannot make material amendments to it, save with the permission of the court as set out in Article 203.

Article 201: Confirmation Hearing

1. Upon the expiration of eight days after notification of the indictment on the defense or, alternatively, upon receipt of the response of the defense under Article 198, the competent judge must set a time and date for a confirmation hearing. The confirmation hearing must be held within twenty working days thereafter.
2. The prosecutor and the defense must be given notice of the confirmation hearing in accordance with Article 27. Any witnesses must be summonsed in accordance with Article 33. The competent judge must summon the suspect in accordance with Article 29, if he or she is not already in detention, to appear at the confirmation hearing.
3. At the commencement of the confirmation hearing, the competent judge must:
 - (a) satisfy himself or herself that the suspect has read, or has had read to him or her, the indictment and that the suspect understands the nature and content of the charges against him or her. If there is a doubt about the suspect's understanding of the indictment, the competent judge must order the prosecutor to explain the indictment to the suspect in a way that he or she can understand it without difficulty;
 - (b) ensure that the rights of the suspect, under Articles 54–71 and Article 172, have been respected, particularly the right to legal assistance;
 - (c) inform the suspect of his or her right to silence and his or her right not to incriminate himself or herself at the hearing;
 - (d) rule on any motions under Article 212, including motions for additional evidence filed by the defense; and

- (e) afford the suspect the opportunity to make an admission of criminal responsibility. If the suspect makes an admission of criminal responsibility, the competent judge must proceed as provided for in Article 87.
4. The burden of proof is on the prosecutor.
 5. The standard of proof at the confirmation hearing is the balance of probabilities.
 6. The suspect, either personally or through his or her defense counsel, may make a statement during the hearing. If he or she chooses to make a statement, the competent judge, the prosecutor, and the counsel for the suspect may ask pertinent questions of the suspect with respect to his or her statement. The suspect is not obliged to respond to any questions posed to him or her.
 7. After hearing the statements of the prosecutor and the suspect, either personally or through his or her counsel, the competent judge may confirm the indictment if it is proven, on the balance of probabilities, that the suspect committed the criminal offense or offenses set out in the indictment.
 8. The competent judge must dismiss the indictment and order a termination of the criminal proceedings if he or she finds that:
 - (a) jurisdiction over the criminal offense cannot be asserted under Articles 4–6 of the MCC;
 - (b) jurisdiction over the person in question cannot be asserted under Article 7 of the MCC;
 - (c) jurisdiction over the person in question cannot be asserted because the person has been tried for the criminal offense and has been finally convicted or acquitted under Article 8 of the MCC;
 - (d) the investigation and prosecution of the criminal offense are barred by the statute of limitations under Article 9 of the MCC;
 - (e) there is insufficient evidence that a criminal offense has been committed by the person in question; or
 - (f) the person in question has died.
 9. Where a judge confirms the indictment of a person who is subject to detention or house arrest, at the end of the hearing the judge must review the detention or house arrest in accordance with Article 188.
 10. Where a person is not already detained or subject to house arrest, bail, or restrictive measures other than detention or bail, the prosecutor may file an oral motion with the court for an order for detention, an order for bail, or an order for restrictive measures other than detention. The procedure set out in Article 187 must be followed in determining whether to grant the order.

Commentary

As discussed in the general commentary to this section, an indictment is confirmed via many different models. The standard of proof required at a confirmation hearing also varies from country to country. In some systems, the standard required is a “prima facie case.” In others, a “sufficient suspicion” is required. The drafters of the Model Codes considered many options from around the world and, after much discussion, decided upon the inclusion of a judicial hearing at which the prosecutor presents evidence and witnesses in order to prove that “on the balance of probabilities” the suspect committed the criminal offenses alleged. During the course of the confirmation hearing, the defense is entitled to be present.

A secondary purpose of the confirmation hearing that especially applies to detained suspects is to ensure that the competent judge conduct a review and examination of whether the rights of the suspect have been respected. The judge at a detention hearing and a hearing for continued detention, bail, or restrictive measures other than detention also has such an obligation. These hearings give the suspect and his or her counsel the opportunity to make claims regarding the violation of his or her rights or other mistreatment.

Once the confirmation hearing is over, the prosecution and the defense will work to prepare the case for trial. From the defense perspective, the prosecutors must fulfill their disclosure obligations and provide the defense with the materials outlined in Part 3 of this chapter. This enables the suspect and his or her counsel to adequately prepare their defense as required under Article 61.

Paragraph 5: Reference should be made to Article 1(36) for a discussion on the different standards of proof contained in the M CCP and on the meaning of “standard of proof.” The standard of proof at the confirmation hearing is that of the balance of probabilities, also called the “preponderance of the evidence.” It is the standard usually employed in civil cases. The balance of probabilities standard requires that evidence of convincing force exists, more than just a mere possibility that a proposition is true. Some commentators have stated that the standard is satisfied if there is a greater than 50 percent chance that the proposition is true. Others have stated that the test is met where it is “more probable than not” that the proposition is true or where the evidence brought forward would incline a fair and impartial mind to believe the proposition is true.

Article 202: Duration between the Confirmation Hearing and the Trial

The trial must commence within one month of the confirmation of the indictment.

Commentary

To ensure the accused's right to trial without undue delay under Article 63 and, where an accused person is detained, his or her right to trial within a reasonable time, Article 202 sets a time limit for trial once the indictment has been confirmed. There may be exceptional circumstances where it is necessary for the prosecution or the defense to have a longer time frame within which to prepare for trial. The time limit contained in Article 202 may, exceptionally, be extended under Article 88. Reference should be made to Article 88 and its accompanying commentary.

Article 203: Amendment of an Indictment after the Confirmation Hearing

1. After the confirmation hearing, the prosecutor may make only material amendments to the indictment by filing a motion for the amendment of the indictment under Article 203 with the registry of the competent trial court.
2. The motion for material amendments to the indictment must be forwarded by the registry of the competent trial court to the competent judge.
3. Where the competent judge agrees to the amendment of the indictment, the newly amended indictment must be served upon the accused and his or her counsel in accordance with Article 27.
4. Where the indictment is amended after the confirmation hearing, the accused may file a preliminary motion under Article 212 or a motion at trial under Article 225(1) for a delay in proceedings to prepare his or her defense with respect to any new matters alleged.

Commentary

Article 200 provides that the prosecutor may make any amendments he or she wishes to the indictment prior to the confirmation hearing under Article 201. After the confirmation hearing pursuant to Article 203, the indictment has become official and the prosecutor may only make material amendments to it by way of motion. Material changes would include new charges and factual allegations. The prosecutor may, however, correct typographical errors or other details such as a misspelling by way of motion.

Part 3: Disclosure of Evidence after the Confirmation Hearing and prior to the Trial

General Commentary

Disclosure, also called *discovery*, is the common term used to connote the procedure whereby relevant evidence is transmitted to or served upon either the prosecution or the defense in advance of the trial. The nature and scope of disclosure vary from state to state and depends on the particular legal system. In some systems, evidence is collected by an investigating judge and placed in a “dossier” (case file), to which the defense may have free access (subject to certain restrictions). In other systems, the defense may be served with a “book of evidence,” which is a compilation of relevant materials. The prosecutor always has disclosure obligations. Depending on the state, the defense may also have such obligations. In some systems, the defense must disclose any defenses that he or she will raise at trial or the existence of an alibi. In others, the defense has more extensive obligations that may include disclosing evidence it will use at trial. In some systems, the defense is required to disclose the names of witnesses it will call at trial so that the prosecutor can investigate the witnesses, but also for the more practical reason of allowing the judge to estimate the length of the trial.

Obligations about the disclosure of evidence to the defense prior to a confirmation hearing are set out in Article 197.

The general duty to disclose supports the accused’s right to defend himself or herself and is a core aspect of his or her right to adequate time and facilities to defend himself or herself, rights protected under Articles 61 and 65, respectively. Furthermore, because the defense is at a disadvantage (it does not have state authority behind it, including a police force and prosecutorial service to investigate the offense), the provision of evidence to the accused is vital to ensure “equality of arms” between the prosecution and the defense, which is an element of the right to a fair trial set out in Article 62.

Article 204: Disclosure and Inspection of Materials in the Possession or Control of the Prosecutor

1. The prosecutor has a duty to provide the defense with an inventory of and to grant access to all relevant materials and evidence that may be used at trial by the prosecutor.
2. The prosecutor also has a duty to provide the defense with an inventory of and access to exculpatory evidence that has not been disclosed under Paragraph 1. Exculpatory evidence is evidence that might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused.
3. The inventory of the materials outlined in Paragraphs 1 and 2 and the granting of access to the materials and evidence must be undertaken within a reasonable time prior to the trial.
4. The duty of the prosecutor to provide the defense with an inventory of and access to all materials and evidence outlined in Paragraphs 1 and 2 is a continuing duty. The prosecutor must provide an inventory of and access to any additional materials or evidence as they become available, without unnecessary delay.
5. The right of the defense to an inventory and access to materials and evidence from the prosecutor is subject only to Articles 205 and 206.

Commentary

Article 204 describes two types of disclosure required of the prosecutor. The first type of disclosure, set out under Paragraph 1, relates to the provision of materials and evidence that will be used at the trial by the prosecutor to build his or her case. This may include witness statements (which may be used to refresh the memory of a witness under Article 259), tangible objects (e.g., a murder weapon), photographs of the crime scene, records, books, data, items belonging to the accused person that were seized, and documents. The second type of disclosure, set out under Paragraph 2, relates to the disclosure of exonerating evidence, or evidence that tends to show the innocence of the accused. Such evidence might include, for example, materials that discredit a prosecution witness, that cast doubt upon the reliability of a confession, or that explain or mitigate the accused's actions. Paragraph 2 concerns the disclosure of unused materials, namely, those materials that were collected but will not be used at trial by the prosecutor.

Any evidence relevant to the trial that was not disclosed to the defense prior to the confirmation hearing must be disclosed “within a reasonable period prior to trial.” This is to give the defense enough time to review the evidence and prepare for trial. Disclosure after the confirmation hearing should take place as close to the confirmation of the indictment as possible. After that, the prosecutor has a continuing duty to provide the defense with information on and access to newly discovered materials and evidence. This duty continues until the appeal, if any, ends.

During the drafting of this provision on disclosure, the drafters of the MCCP discussed the modality by which disclosure should be affected. One method is for the prosecutor to make copies of all evidence, including, for example, audio- and videotapes of the questioning of the accused, and hand it over to the defense, as is common in some countries. Given the inevitable resource constraints in a post-conflict state, the drafters considered it preferable for the prosecutor to give an inventory, or list, of the evidence outlined under Paragraph 2. The defense is then granted the right to inspect the evidence and materials, most likely at the office of the prosecutor. In order to implement Article 204, provisions need to be made as to when the defense can make copies of evidence and how the inspection of evidence by the defense will be facilitated. Care also needs to be taken in allowing the defense to inspect evidence to ensure that the defense does not have access to evidence that is not subject to disclosure or other pieces of evidence, such as those that contain details of the name of an anonymous witness.

Article 205: Matters Not Subject to Disclosure

1. Reports, memoranda, or other internal documents prepared by the prosecutor in connection with the investigation or preparation of the case are not subject to disclosure.
2. If the prosecutor is in possession of information that has been provided to the prosecutor on a confidential basis and that has been used solely for the purpose of generating new evidence, the initial information and its origin must not be disclosed by the prosecutor without the consent of the person or entity providing the initial information and will not, in any event, be given in evidence without prior disclosure to the defense.

Commentary

Not every element of the prosecutor's case file will be disclosed to the defense. In addition to the restrictions set out in Article 206, Article 205 provides that work products belonging to the prosecutor are not subject to disclosure. Paragraph 2 refers to certain information obtained on a confidential basis that is not subject to disclosure. This includes, for example, information obtained through intelligence agencies. In a post-conflict setting, it may include military intelligence obtained from international military forces. This information is not subject to disclosure where it is used to generate evidence rather than as primary evidence that will be introduced at trial. Usually information intelligence merely gives the prosecutor or police clues as to how to proceed in the investigation rather than provides evidence that they will enter at trial.

Article 206: Restrictions on Disclosure

1. The prosecutor must file a motion where the criteria for disclosure under Article 204 are met, but where the prosecutor nonetheless seeks to restrict the disclosure of the particular piece of evidence on the grounds set out in Paragraph 3(a)–(c) below.
2. Restrictions on disclosure may involve a total restriction on access to the relevant piece of evidence. Restrictions may also involve the delay, limitation, or other regulation of disclosure of the evidence.
3. Taking into account the interests of justice and the rights of the accused, the competent judge may restrict disclosure of evidence through an order for restriction of disclosure where there is substantial risk:
 - (a) to the integrity of physical evidence;
 - (b) of physical harm to any person; or
 - (c) to public safety or national security.
4. Where an order for protective measures under Article 147(1)(b) has been granted, the materials may be redacted to conceal the identity of the witness under threat.
5. Where an order for protective measures under Article 147(1)(d) has been granted, a pseudonym may be used in the materials to conceal the identity of the witness under threat.
6. The name of the protected witness must be disclosed to the defense sufficiently in advance of the trial.

7. Where an order for anonymity under Article 159 has been made, any information that may reveal the identity of the anonymous witness must be removed from any materials provided to the defense.

Commentary

Certain pieces of evidence may meet the disclosure test laid down in Article 204, but the prosecutor may seek to restrict access to them because disclosure will cause a substantial risk to the integrity of the evidence or potential harm to a person or to public safety or national security. Given the restrictions that this provision places on the rights of the accused, it is envisaged that it would be used exceptionally and where no other alternative exists. In some states, rather than fully limit access to evidence, written statements or other evidence is sanitized or edited to remove sensitive information and the edited version is made available to the defense. Some states also have special procedures for disclosure of sensitive information, such as requiring defense counsel to obtain security clearance. (See Colette Rausch, ed., *Combating Serious Crimes in Postconflict States: A Handbook for Policymakers and Practitioners*, p. 103)

Where a protective order has been granted that involves the temporary concealment of the identity of the witness from the defense or the redaction of materials to conceal the identity of the witness, the protective order will already have provided for nondisclosure until a specified time and will serve on its own as a legal means to restrict disclosure. There is thus no need for the prosecutor to file a motion for restrictions on disclosure. Where an anonymous witness order has been granted, disclosure of any evidence that may lead to the identity of the witness being found out will be fully restricted. Once again, the order for witness anonymity will serve as the legal grounds on which the prosecutor can justify nondisclosure of certain evidence related to the anonymous witness.

Article 207: Disclosure of the Names of Prosecution Witnesses to Be Called at Trial

1. The prosecutor must disclose to the defense within a reasonable period of time prior to the trial the names of the witnesses he or she intends to call at the trial.
2. The list of witnesses supplied to the defense under Paragraph 1 may exclude the names of any witnesses whose names cannot be disclosed at the time

because the witness is the subject of an order for witness protection or witness anonymity.

3. After disclosure of the witness list under Paragraph 1, where the prosecutor decides to call a witness that he or she did not know about previously or did not intend to call at the time, the prosecutor must inform the defense as soon as he or she decides to call the witness at trial.
4. Where the defense is informed of a new witness under Paragraph 3, it may file a preliminary motion under Article 212 or a motion at trial under Article 225(1) for a delay in proceedings to prepare his or her defense.

Commentary

Just like at a confirmation hearing, the defense must be aware of the witnesses that will be called against the accused at trial. The defense must also be aware of the names of these witnesses sufficiently in advance of the trial to inquire into their background and to study evidence that these witnesses may give at trial (which will in part be facilitated by access to witness statements). Under Article 64 of the MCCP, the accused has the right to examine witnesses. The accused also has the right to adequate time and facilities to prepare his or her defense under Article 61. According to Amnesty International's *Fair Trials Manual*, "The right of the accused to adequate time and facilities to prepare a defense includes the right to prepare the examination of prosecution witnesses. There is therefore an implied obligation on the prosecution to give the defense adequate advance notification of the witnesses that the prosecution intends to call at trial" (section 22.2).

Article 208: Disclosure Obligations on the Defense

The defense must notify the prosecutor in writing, within a reasonable period prior to the trial, of its intention to:

- (a) present an alibi to the alleged criminal offense or offenses set out in the indictment, specifying the place or places at which the accused claims to have been present at the time of the alleged criminal offense or offenses and the names of any witnesses and any other evidence supporting the alibi; or
- (b) present grounds for excluding criminal responsibility under Articles 23–26 of the MCC, specifying the names of witnesses, expert witnesses, and any other evidence supporting such grounds.

Commentary

The level of defense disclosure varies from state to state, from zero disclosure through what is known as “reciprocal disclosure” (where the defense’s request for disclosure from the prosecutor triggers identical levels of disclosure from the defense). Some commentators have objected to the trend toward defense disclosure on the grounds that it violates the accused’s right to silence and right to be free from self-incrimination (Article 57 of the MCCP). In contrast, some argue that increased defense disclosure enhances the efficiency of proceedings and trial management and is beneficial for the innocent accused. Between these two positions lies a middle ground where the defense is required to disclose its intention to present an alibi or to present any of the grounds excluding criminal responsibility (defenses) set out in Articles 23–26 of the MCC. In some systems, the accused will also be required to disclose the names of witnesses it intends to call. The MCCP follows the middle ground, balancing the rights of the accused against the need for efficiency and enhanced trial management.

Article 209: Disclosure of the Names of Defense Witnesses to Be Called at Trial

1. The defense must disclose to the prosecutor within a reasonable period of time prior to the trial the names of the witnesses it intends to call at the trial.
2. After disclosure of the witness list under Paragraph 1, where the defense decides to call a witness that it did not know about previously or that it did not intend to call at the time, the defense must inform the prosecutor as soon as it decides to call the witness at trial.
3. Where the prosecutor is informed of a new witness under Paragraph 2, he or she may file a motion for a delay in proceedings.

Commentary

The nature of the defense’s obligation to disclose the names of witnesses to be called at trial is identical to that of the prosecutor’s under Article 207.

Article 210: Breach of Disclosure Obligations by the Prosecutor or the Defense prior to the Trial

1. After the confirmation hearing and prior to the trial, the prosecutor or the defense may file a preliminary motion for disclosure under Article 212 in order to compel the other party to comply with its disclosure obligations under the MCCP.
2. Where the prosecutor or the defense intentionally fails to comply with the court order to disclose under Paragraph 1, the court may impose a sanction for noncompliance with a court order under Article 41.

Article 211: Breach of Disclosure Obligations by the Prosecutor or the Defense during the Trial

1. During the trial, where the trial court learns that the prosecutor or the defense has failed to comply with the disclosure obligations in the MCCP or an order of the trial court relating to disclosure, the trial court must order the prosecutor or the defense to disclose the relevant evidence.
2. Where the prosecutor or the defense intentionally fails to comply with the court order to disclose under Paragraph 1, the court may impose a sanction for noncompliance with a court order under Article 41.

Part 4: Preliminary Motions

Article 212: Preliminary Motions

1. Preliminary motions may be raised at any time prior to the commencement of the trial.
2. Either party may file any of the following preliminary motions:
 - (a) a motion alleging defects in the form of the indictment;
 - (b) a motion seeking severance of accused persons joined in the indictment under Article 193 or criminal offenses joined in the indictment under Article 194;
 - (c) a motion for disclosure of certain evidence that has not been disclosed by the prosecutor or the defense as required under the MCCP;
 - (d) a motion seeking the suppression of certain evidence;
 - (e) a motion raising objections based upon refusal to grant legal assistance under Article 67; and
 - (f) a motion seeking the adjournment of the confirmation hearing where the prosecutor has amended the indictment under Article 200.
3. Preliminary motions must be in writing and filed with the registry of the competent trial court.

Commentary

A motion is an application by the prosecutor or the defense to obtain a judicial order in favor of the applicant (see Article 1[32]). Once the trial commences, both the prosecution and the defense may make motions to the trial court. Both parties may also raise motions relating to the period of time since the confirmation of the indictment under Article 201.

Paragraph 2(c): Reference should be made to Articles 204–209 on the parties’ disclosure obligations under the MCCP.

Paragraph 2(d): Paragraph 2(d) refers to suppression of certain evidence, which means that the party filing the motion seeks to limit certain evidence being used at trial, for example, because the evidence was obtained illegally. This paragraph may be used to suppress evidence where the evidence derives from a search that was conducted with-

out a warrant or where the police officer who executed the warrant went beyond the scope of the warrant (which is the equivalent of not having a warrant in the first place). A confession obtained through torture or other cruel, inhuman, or degrading treatment may also be targeted for suppression by the defense.

Chapter 11: Trial of an Accused

Part 1: General Provisions

Article 213: Requirement of a Public Trial

- 1. All proceedings before a trial court, other than deliberations of the judge or panel of judges, must be held in public, except as otherwise provided for under Article 62.
- 2. Where the trial court orders the court to sit in closed sessions, it must state in public the reasons for the order and the duration of the order.

Commentary

Article 213 reiterates the right to a public trial that is set out in Article 62 of the M CCP. The court must publicly state the grounds upon which the closure of the court session will be based. These grounds must correspond with at least one of the grounds set out in Article 62(2). The trial should remain closed for the shortest time possible, and the court must publicly announce the duration of the closed session.

Article 214: Trial in the Presence of the Accused

- 1. The accused must be present during his or her trial, except as provided for in the M CCP.
- 2. The accused may waive his or her right to be present during the trial, provided he or she is represented by counsel throughout the trial.
- 3. The trial of a person must not be held in his or her absence, and the accused must be present throughout the trial, except where the accused is removed from the courtroom because of an order for a protective measure set out in

Article 147(f) or for misconduct before the court under Article 40, or where the accused flees as set out in Paragraph 6.

4. Where the accused is removed from the courtroom because of an order for a protective measure under Article 147(f), he or she must be returned to the courtroom after the witness has finished testifying. Counsel for the accused must remain in the courtroom while the witness is testifying and may question the witness.
5. Where the accused is removed from the courtroom under Article 40, the trial may run until its conclusion without the accused being present, unless the trial court finds good cause as to why the reasons for excluding the accused no longer apply. Counsel for the accused must remain in the courtroom during the absence of the accused.
6. If at some stage after the indictment of the accused is confirmed at the confirmation hearing under Article 201, the accused flees or fails to attend without the leave of the trial court, the trial may run until its conclusion, provided that the accused is represented by counsel throughout.
7. The accused must sit beside his or her counsel at trial and may consult with him or her throughout the hearing without restriction, subject to Article 40.

Commentary

The right of the accused to be present during a trial is found in Article 62 of the MCCP. It is important to note that counsel for the accused must be present when the accused is not to safeguard the rights of the accused. The same principle applies to a situation where the accused waives his or her right to be present during the trial.

Paragraph 6: Paragraph 6 does not advocate for a trial in the absence of the accused—often known as a *trial in absentia*. Instead it provides for a trial to take place in the absence of the accused if the accused, through his or her own will, has fled the jurisdiction and has voluntarily reneged his or her right to be present during his or her trial. The drafters of the MCCP were of the view that, despite the accused having implicitly reneged his or her right to be present during the trial, counsel must be present during the entirety of the trial to represent the interests of the absent accused person. If the accused has not engaged counsel, the state is responsible for providing counsel for the accused person. Reference should be made to the commentary to Article 62, which discusses the issue of trials in the absence of the accused in light of international human rights norms and standards.

Article 215: Requirement of the Presence of Judges throughout the Trial

The competent judge or panel of judges must be present throughout the trial.

Article 216: Burden of Proof and Standard of Proof

- 1. The burden of proof at trial is on the prosecutor.
- 2. The standard of proof applicable at trial is that of “beyond reasonable doubt.”
- 3. The accused must not be convicted of a criminal offense unless the prosecutor proves beyond reasonable doubt that the accused committed the criminal offense.

Commentary

Paragraph 1: The burden of proof is a party’s duty (in this context, the prosecutor) to prove a disputed assertion or charge. Placing the burden of proof on the prosecutor is an element of the right to the presumption of innocence set out in Article 56.

Paragraph 2: The standard of proof is the degree or level of proof needed in a specific case. This standard is used in many jurisdictions around the world. It is difficult to define, but in general it means that the trier of fact, namely the judge, must have no doubt that would prevent him or her from being firmly convinced of the accused’s criminal responsibility for the offenses charged.

Article 217: Record of Trial Proceedings

- 1. A full and accurate record of the proceedings shall be made in accordance with Article 37.

2. The competent judge or the panel of judges may, at its discretion, permit photography or audio or video recording of the proceedings other than by court officials.

Article 218: Transmission of Records of Prior Proceedings to the Trial Court

All the original records of prior proceedings in the case, excluding hearings on protective measures and witness anonymity under Articles 152 and 160, respectively, and hearings on cooperative witnesses under Article 166, must be transmitted to the trial court by the registry prior to the commencement of the trial.

Part 2: Trial Procedure

General Commentary

In some legal systems, the trial is predominantly judge led. The judge or panel of judges, as the case may be, will have had access to the case file in advance and will be aware of the evidence for and against the accused. The prosecutor will be present during the trial, and the accused may have counsel present (as may the victim in some states). The trial is conducted through the judge, who takes an active role in questioning any witnesses present. In other legal systems, the judge is viewed as more of an impartial referee of adversarial proceedings between the prosecution and the defense. The judge has a more passive role. Predominantly, though, the proceedings are party led and driven. The judge, as the trier of fact, will not have had access to the evidence in advance, and so the crux of the trial is that the relevant evidence of the opposing parties (i.e., the prosecutor and the defense) will be presented to the court. Each side will call witnesses, which the other side is permitted to cross-examine. The trial procedure under the MCCP is a hybrid of these two systems. It is constructed as an adversarial process, a contest between parties after which the judge or panel of judges must decide whether the prosecutor proved “beyond a reasonable doubt” that the accused committed the criminal offenses charged. That said, the MCCP also gives the court certain powers to adduce additional evidence, call witnesses, and question witnesses, making the judge more an active participant in the proceedings (see Part 3).

Where a post-conflict state is thinking of reforming its criminal procedure laws, and where it has not previously adhered to an adversarial trial procedure, prosecutors and lawyers may be unfamiliar with the techniques of examining and cross-examining a witness. In some post-conflict states, where new laws have been introduced on trial procedures, there have been difficulties with both parties not feeling competent to actively partake in proceedings in the manner envisaged in the law. Where there is a shift from nonadversarial to adversarial proceedings in the law, counsel and prosecutors must be sufficiently trained in the necessary courtroom skills to advocate the case effectively.

The procedure set out in the MCCP involves the official commencement of the proceedings by the judge (Article 220) and the determination of any motions (Article 221). This is followed by opening statements of both parties (Article 222). In some systems, after both parties have made their opening statements, the accused is entitled to make an unsworn statement to the court. The effect of the statement being unsworn is that the accused cannot be prosecuted for anything he or she says in the course of it under Section 17 of Part II: Special Part of the MCC (“Offenses against the Administration of Justice”). In other systems, the only participation that the accused may have is as a witness. It is therefore a strategic decision for the defense as to whether the accused may testify, because testimony is taken under oath and the accused may be cross-examined by the prosecutor. Under the MCCP, the accused may make an unsworn statement after the opening statements of the prosecutor and the defense (Article 222). After the opening statements, the presentation of evidence begins (Article 224). After the evidence of both parties has been presented, and any additional evi-

dence is brought by the judge or panel of judges under Article 239, the parties may make closing statements (Article 227). At any time, the court may adjourn or call recess on the case under Articles 225 and 226, respectively. Once closing statements are made, the judge or panel of judges will officially close the trial under Article 227 and will then go into deliberations and finally render a judgment under Chapter 11, Part 6.

Article 219: Joint and Separate Trials

1. In joint trials, each accused must be accorded the same rights as if such accused persons were being tried separately.
2. The trial court may order that persons accused jointly of a criminal offense under Article 193 be tried separately, if the trial court considers it necessary:
 - (a) to avoid a conflict of interests that might cause serious prejudice to either or both accused; or
 - (b) to protect the interests of justice.

Article 220: Commencement of the Trial

At the beginning of the trial, the judge, or the presiding judge of a panel of judges, must:

- (a) call upon the prosecutor and the defense;
- (b) verify the names of the prosecutor, the accused, and counsel for the accused and enter the names into the record;
- (c) declare the trial open;
- (d) require the prosecutor to read the indictment to the accused;
- (e) confirm that the accused understands the nature and contents of the counts against him or her in the indictment;
- (f) confirm that the rights of the accused, under Articles 54–71 and Article 200 have been respected, in particular the right to legal assistance;
- (g) inform the accused of his or her right to freedom from self-incrimination and his or her right to silence; and
- (h) determine what statements or admissions, if any, the accused will make regarding the criminal offense or offenses alleged. If the accused makes

an admission of criminal responsibility, the trial court must proceed as provided for under Article 87.

Commentary

At the outset of the trial, under Subparagraph (h), the accused may make an admission of criminal responsibility, in which case, if the criteria set out in Article 87 are met, the trial will not take place and the judge or panel of judges will move straight to the determination of penalties. The accused is not obliged to “enter a plea,” meaning that the accused is not obliged to indicate whether he or she is or is not criminally responsible. Subparagraph (h) merely gives the accused an opportunity to make an admission under Article 87, if he or she so wishes.

Article 221: Motions Relating to Trial Proceedings

1. The judge, or the presiding judge of a panel of judges, must ask the prosecutor and the defense whether they have any objections or observations concerning the conduct of the proceedings that have arisen since the confirmation hearing.
2. Such objections or observations may not be raised or made again on a subsequent occasion in the trial proceedings without leave of the trial court.
3. After the commencement of the trial, the trial court, of its own accord or on the motion of the prosecutor or the defense, must rule on issues that arise during the course of the trial.

Commentary

At the confirmation hearing, the competent judge will have heard any motions of the parties (see Article 201); subsequently, the parties will have had the opportunity to lodge preliminary motions under Article 212. They also have the opportunity to do so prior to their opening statements. If the parties choose not to present any objections or observations concerning the conduct of proceedings after the confirmation hearing (and prior to the trial), they are precluded from bringing these before the court during the trial under Paragraph 2. However, other motions unrelated to the proceedings from the confirmation hearing until the commencement of the trial may be raised at

any time by the parties during the trial. These motions will be dealt with by the court as they arise.

Article 222: Opening Statements

1. Prior to the presentation of evidence by the prosecutor and the statement of the accused, if any, each party may make an opening statement.
2. The defense may, in the alternative, elect to make its statement after the conclusion of the presentation of evidence by the prosecutor and prior to the presentation of evidence by the defense.

Article 223: Statement of the Accused

1. After the opening statements of the parties, or if the defense elects to defer its opening statement under Article 222, after the opening statement of the prosecutor, the accused may, if he or she so wishes, make a statement.
2. The accused may not be compelled to make a solemn declaration and must not be examined about the content of the statement by the prosecutor or the trial court.
3. The trial court must decide on the probative value, if any, of the statement of the accused.

Commentary

As discussed in the general commentary to Part 2, the manner in which the accused may give evidence during a trial varies from state to state. In some systems, if the accused wishes to make a formal statement, he or she must act as a witness in the case and therefore must take an oath and may be cross-examined. In other systems, the accused may make an uninterrupted, unsworn statement to the court. Under the MCCP, the accused may make such an unsworn statement. When the court is assessing the totality of the evidence, it must assess the probative value (for a discussion of probative value, see the commentary to Article 228) of the accused's statement in the context of all the other evidence. The statement will then be taken into account in determining the accused's criminal responsibility. The accused may also opt to deliver

sworn testimony before the court under Article 246, in the alternative to an unsworn statement under Article 223.

Article 224: Presentation of Evidence during the Trial

1. Each party is entitled to call witnesses and present evidence during the trial.
2. Unless otherwise directed by the trial court in the interests of justice, evidence at trial must be presented as follows:
 - (a) evidence of the prosecutor;
 - (b) upon conclusion of the evidence of the prosecutor, evidence of the victim, if permitted under Article 76;
 - (c) upon conclusion of the evidence of the victim, evidence of the defense;
 - (d) after the defense has presented its case, the prosecutor must be given the opportunity to respond to the evidence presented by the defense. The defense must then be allowed to reply to the prosecutor; and
 - (e) additional evidence ordered by the trial court under Article 239.
3. Direct examination, cross-examination, and reexamination of witnesses may be conducted by the prosecutor and the defense.
4. It is the responsibility of each party calling a witness to examine each witness, but a judge may at any stage put any question to the witness.
5. Cross-examination must be limited to:
 - (a) the subject matter of the direct examination; or
 - (b) matters affecting the credibility of the witness.
6. The trial court may, in the exercise of its discretion, permit an inquiry into additional matters to those set out in Paragraph 6.
7. The prosecutor and defense may, during examination-in-chief, cross-examination, and reexamination, object to any question posed by the other on grounds of relevance. The trial court must decide on such objections as they are raised.
8. The trial court must exercise control over the mode and order of the questioning of witnesses and the presentation of evidence during examination-in-chief, cross-examination, and reexamination so as to:

- (a) make the questioning and presentation effective for the ascertainment of the truth; and
- (b) avoid needless consumption of time.

Commentary

Paragraph 3: Reference should be made to Article 1(16) and 1(9) for the definitions of *direct examination* and *cross-examination*. Reexamination may be conducted only by the party who called the witness. For example, a prosecution witness may be directly examined by the prosecutor, cross-examined by the defense, and then reexamined by the prosecutor.

Paragraph 5: The principle provided under Subparagraph (b) that allows questioning relating to the credibility of a witness is important if either party wants to impeach a witness (see Article 261 and its accompanying commentary).

Article 225: Adjournment of the Trial

1. Upon the oral motion of the prosecutor or the defense, the trial may be adjourned if:
 - (a) new evidence needs to be obtained;
 - (b) the opposing party decides to call a new witness that was not previously known to the party making the motion;
 - (c) the defense has had insufficient time to prepare a defense as required under Article 61;
 - (d) the indictment has been amended under Article 203;
 - (e) the accused has been found mentally incompetent to stand trial under Article 89;
 - (f) a witness or expert witness fails to appear before the court; or
 - (g) any other impediment exists that justifies the adjournment of the trial.
2. If the court decides to grant the motion for adjournment of the trial, it must enter the adjournment in the record of the trial and, where possible, set a date and time for the resumption of the trial.
3. Where the court orders the adjournment of the trial, it must order that the evidence be secured by the registry during the adjournment period.

Commentary

When a trial is adjourned, it may be for weeks or months. A recess, on the other hand, usually involves only a matter of hours (see Article 226). In adjourning the trial, the court should consider the right of the accused to a trial without undue delay under Article 63, which applies until the completion of the proceedings.

Article 226: Recess of the Trial

The court may order recess of the trial:

- (a) due to the fact that the workday has ended;
- (b) to obtain certain evidence quickly; or
- (c) for any other justifiable reason.

Article 227: Closing Arguments and Closure of the Trial

1. After the presentation of all evidence, the prosecutor may present a closing argument.
2. After the closing argument of the prosecutor, if any, the defense may make a closing argument.
3. The prosecutor may present a rebuttal argument to which the defense may present a response to the rebuttal argument.
4. The trial court may, at its discretion, limit the time of the closing arguments.
5. When the prosecutor and the defense have presented closing arguments and rebuttal and response to rebuttal, the judge, or the presiding judge of a panel of judges, must declare the hearing closed.

Commentary

Paragraph 3: *Rebuttal evidence* is evidence that attempts to disprove or contradict the evidence presented by the other party.

Part 3: Rules of Evidence

General Commentary

In formulating the rules of evidence that would be incorporated into the M CCP, the drafters considered the variety of options that exist around the world. In some systems, volumes of detailed rules of evidence admissibility aim to exclude objectionable pieces of evidence or “hearsay evidence” (i.e., a statement made out of court). This is especially the case in systems employing the jury trial system, given the possible prejudicial effect of such evidence. In other systems, the rules of evidence are much more flexible and allow the inclusion of almost all evidence, based on the notion that a professional judge will be able to distinguish between evidence that is credible and evidence that is not. This evidence may have been taken in advance of the trial and thus will not be given by a “live” witness during the trial. The approach adopted in the M CCP is a combination of these two positions. The rules of evidence in the M CCP are generally flexible. The M CCP adopts a “free system of evidence”; however, there are a number of exclusionary rules. In addition, the M CCP rules favor live testimony in court, subject to certain exceptions.

In some systems, the judge will have had access to all the evidence in the case file in advance of the case and will be familiar with this evidence. In such systems, the trial is normally briefer than an adversarial trial because the judge, as the trier of fact, is already aware of the evidence. Under the M CCP, as discussed previously, the trial is adversarial. Consequently, all evidence must be presented to the court in open court and thus will be entered into the court record for the first time. This should be the first time the judge hears the evidence as well.

Article 228: General Provisions on Evidence

1. The rules of evidence contained in Part 3 apply to all proceedings before the court.
2. The court must admit and consider all evidence that it deems is relevant and has probative value with regard to the specific criminal proceeding, subject to other provisions of the M CCP providing for the exclusion of certain evidence.
3. The court has the authority to assess freely all evidence submitted in order to determine the evidence’s admissibility and probative value.

Commentary

Paragraph 2: The general rule of evidence contained in Paragraph 2 is based on that contained in the Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia (Rule 89[C]) and the Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (Rule 89[C]). The elements of this rule on evidence are also found in many domestic jurisdictions. Consequently, the case law of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda on the meaning of these rules helps explain their meaning.

The general trend at the international tribunals is to admit any relevant and reliable evidence that has probative value, leaving the court to decide on the weight to be accorded such evidence in the context of all evidence admitted (see *Prosecutor v. Blaškić*, Judgment, Trial Chamber [March 3, 2000], paragraph 34). *Relevant* means there must be a nexus between the evidence and the subject matter (see *Prosecutor v. Tadić*, Decision on Defense Motion on Hearsay [August 5, 1996], paragraph 18; and *Prosecutor v. Musema*, Judgment, Trial Chamber [January 27, 2000], paragraph 39). The definition of *probative value* is not as simple. In *Prosecutor v. Tadić*, Judge Stephens opined that probative value is a “quality of necessarily very variable content and much will depend on the character of the evidence in question.” The probative value of evidence depends on whether it tends to prove an issue that is relevant to the proceedings (*Prosecutor v. Delalić et al.*, Decision on the Prosecutor’s Oral Request for the Admission of Exhibit 155 into Evidence and for an Order to Compel the Accused, Zdravko Mucic, to Provide a Handwriting Sample [January 19, 1998], paragraph 29).

In addition to the twin requirements of relevance and probative value, evidence must also be reliable (*Prosecutor v. Delalić et al.*). The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia emphasized in *Prosecutor v. Kordić and Cerkez* (Decision Regarding Statement of a Deceased Witness, Appeals Chamber [July 21, 2000]) that reliability should be assessed at the admissibility stage rather than at the end of the trial, when the judges are apportioning weight to all admitted evidence. Reliability has to be assessed in the context of the facts of each particular case and requires a consideration of the circumstances under which the evidence arose, the content of the evidence, and whether and how the evidence is corroborated, as well as the truthfulness, voluntariness, and trustworthiness of the evidence (see *Prosecutor v. Musema*, paragraphs 38–39).

Article 229: Refusal to Allow Irrelevant or Repetitive Evidence

The court must refuse to allow the introduction of certain evidence where:

- (a) the taking of such evidence to supplement other evidence is unnecessary or is superfluous because the matter is common knowledge;

- (b) the fact to be proven is irrelevant to the decision or has already been proven;
- (c) the evidence is wholly inappropriate or unobtainable; or
- (d) the evidence is submitted only to prolong the proceedings.

Article 230: Exclusion of Evidence Obtained in Violation of the M CCP or in Violation of the Rights of the Accused

1. The court must not base any of its decision on evidence that must be excluded in accordance with the present article.
2. The court must exclude:
 - (a) evidence obtained in violation of Article 115 where a particular investigative measure was carried out without a warrant, where a warrant is required under the M CCP;
 - (b) evidence obtained in violation of Article 115 where a particular investigative measure was carried out without a warrant, where such a measure was permissible under the M CCP but where no validation of the warrantless measure was received from a judge as required under Article 115;
 - (c) any statement that is established to have been made as a result of torture or cruel, inhuman, or degrading treatment as provided for in Article 232;
 - (d) evidence of privileged communications made with persons not required to testify before the court as provided for in Article 233;
 - (e) evidence of privileged information, documents, or other evidence of the International Committee of the Red Cross as provided for in Article 234; and
 - (f) evidence of sexual conduct as provided for in Article 235.
3. A confession or other incriminating statement must be excluded where:
 - (a) the provisions of Articles 106–109 of the M CCP were not complied with;
 - (b) the confession or statement was made otherwise than in the presence of a lawyer, where the presence of a lawyer is required under the M CCP; or
 - (c) the confession or statement was made otherwise than in the presence of a lawyer by a person who waived his or her right to have a lawyer present but where the waiver was not made voluntarily.

4. Paragraph 3 applies to the statements of suspects, accused persons, witnesses, or expert witnesses.
5. In addition to the exclusion of evidence under Paragraphs 2 and 3, the court must exclude a certain piece of evidence where such evidence has been obtained in violation of the MCCP or the applicable law and:
 - (a) the circumstances in which the evidence was obtained casts substantial doubt on its reliability; or
 - (b) regarding all the circumstances, including the nature of the violation and the circumstances in which the evidence was obtained, its probative value is outweighed by the need to ensure the integrity and fairness of the proceedings and the rights of the accused.
6. Evidence derived from evidence that must be excluded under Paragraphs 2 and 3 must also be excluded where:
 - (a) a causal link exists between evidence in question and evidence that was obtained in violation of the MCCP or the applicable law; and
 - (b) the evidence in question was obtained by active exploitation by the police or the prosecution of the initial violation.
7. The decision of the court to exclude evidence under Article 230 may be appealed by way of interlocutory appeal under Article 295.

Commentary

The scope of exclusionary evidence rules varies from state to state. Some states possess very detailed and strict exclusionary rules, whereas other states possess relatively few. In order to draft the provisions on exclusion of evidence, the drafters of the MCCP examined criminal procedure laws from around the world in addition to the criminal procedure rules of the international tribunals (the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda) and the International Criminal Court. The drafters also looked at international conventions, such as the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, that contain provisions on the exclusion of evidence.

The drafters of the MCCP strongly supported the inclusion of exclusionary rules in order to preclude the use of evidence in court that was obtained unfairly, illegally, irregularly, or in violation of the human rights of an accused.

Paragraph 2(a) and 2(b): Reference should be made to the commentary to Article 115 for a discussion of both of these grounds for exclusion of evidence.

Paragraph 2(c): Reference should be made to the commentary to Article 232 for a discussion of the exclusion of evidence obtained through torture or cruel, inhuman, or degrading treatment.

Paragraph 2(d): Reference should be made to the commentary to Article 233, which discusses the exclusion of privileged communications.

Paragraph 2(e): Reference should be made to Article 234 and its accompanying commentary on the exclusion of evidence obtained from the International Committee of the Red Cross.

Paragraph 2(f): Only certain evidence of prior sexual conduct may be included in evidence. Reference should be made to Article 235 and its accompanying commentary for a full discussion of this exclusionary rule.

Paragraphs 3 and 4: Paragraph 4 applies to both confession evidence and other incriminating statements.

Regarding confession evidence, in many states, there is a history of relying exclusively, or almost exclusively, on confession evidence to secure a conviction against an accused person. In some instances, the extraction of confessions through torture, coercion, threats, or other cruel, inhuman, or violent acts is routinely carried out. In many post-conflict states, particularly those that were previously subject to dictatorial or oppressive regimes, forced confessions may have been routine. Although confessions may be an important element of the evidence in a criminal case, post-conflict states should develop criminal investigation capacities beyond a simple confession. This will require training in criminal investigation means and methodologies and adequate resourcing of the police and the prosecution service. It is also important that, if it existed, the culture of tolerance and impunity for forcibly extracted confessions be addressed. In doing so, the rights of the suspect will be protected (e.g., the right to freedom from coercion, threat, torture, or cruel, inhuman, or degrading treatment contained in Article 58 of the MCCP and the rights to silence and to freedom from self-incrimination under Article 57).

The issue of forced confessions may be addressed on one level by training and by awareness campaigns both within the criminal justice system, especially the police force, and beyond it (i.e., the general public). The police and the public should understand the rights that a suspect has and that a suspect cannot be forced to make a confession or to answer any allegations posed by the police or the prosecutor. Beyond training and awareness campaigns, the applicable law should adequately address the problem of forced confessions. One way to do this, which was favored by the drafters of the Model Codes, is to provide for a specific exclusionary rule that requires the automatic exclusion of improperly obtained confession evidence. This exclusionary rule is set out in Article 230.

There is some overlap between the various exclusionary rules contained in the MCCP. A confession may, for example, be excluded under Article 232 if it was deemed to be obtained through torture or cruel, inhuman, or degrading treatment or under

Article 230(5)(b) if its probative value is substantially outweighed by the need to ensure the integrity and fairness of the proceedings and the rights of the accused.

As stated in Paragraph 4, Article 230 applies not only to suspects or accused persons who make a confession but also to other persons questioned by the police or the prosecutor who make an incriminating statement. Thus, where a witness makes a statement in an interview with police that tends to show that the witness or another person is guilty of a criminal offense, this statement must be excluded from evidence where the police did not follow the correct procedures for questioning a person set out in the MCCC.

Paragraph 5(a): This paragraph contains a general exclusionary rule applying to all violations of the MCCC and the applicable law. Paragraphs 2 and 3 set out a number of specific violations of the MCCC that lead to an automatic exclusion of evidence, for example, where a statement was elicited through torture. Paragraph 5, in contrast, addresses any other violation of the MCCC or the applicable law—large or small—and provides the judge with guidelines on how to address evidence obtained in contravention of the law. In assessing whether or not to exclude evidence obtained in violation of the MCCC or the applicable law, the court must assess the evidence to determine whether the circumstances in which the police or the prosecutor got the evidence “casts substantial doubt on its reliability.” The court must also assess and balance the probative value of the evidence (this concept is discussed in the commentary to Article 228) against the need to ensure integrity and fairness in the proceedings, coupled with the need to ensure the rights of the accused. Where a judge finds that a piece of evidence has probative value but where the inclusion of such evidence would damage the integrity of the proceedings, then the evidence must be excluded by the judge.

Paragraph 5(b): This paragraph sets out a general exclusionary rule that allows the court, at any point, to exclude a particular piece of evidence where its probative value is substantially outweighed by its prejudicial effect. (The meaning of probative value is discussed in the commentary to Article 228.) Under this paragraph, the court must employ a delicate balancing act, balancing the probative value of the particular piece of evidence against the effect that this piece of evidence may have on the fairness of the trial. The court must determine whether the level of unfairness about how the evidence was obtained is so significant as to merit exclusion of a piece of evidence of strong probative value (which may be significant and even crucial to the case). The wording of Paragraph 5(b) is purposely broad; it requires the court to look into all the circumstances surrounding the case, including how the evidence was obtained, and determine whether the mode by which the evidence was obtained is such that the evidence would be unfair to the accused. The court may look to a number of factors to determine fairness, for example, whether the evidence was obtained through telling the accused an untruth, through another form of deceit, in some other improper manner, or in violation of the law. Primarily, the court is looking at whether the evidence was obtained in bad faith. With regard to a breach of the law or procedure, the court may find that the evidence may still be admitted despite a breach of the law if that breach was not substantial or significant.

Paragraph 6: Paragraph 6 addresses the question of exclusion of evidence that derives from illegally obtained evidence that has been excluded either under the mandatory exclusionary rule under Paragraphs 2 or 3 or under the “discretionary” (balancing approach) rule under Paragraph 5. In legal theory, such evidence is also known as the “fruits of the poisonous tree”—a doctrine under which evidence that is in itself “legally” obtained but is tainted by the illegal methods in which the preceding evidence was obtained should also be inadmissible. For instance, if a statement or a confession obtained by illegal methods is inadmissible evidence, so must be a weapon found on the basis of such information—even though a search warrant was obtained to seize this weapon.

Similar to the exclusionary rule itself, this doctrine is controversial regarding the scope of its application. However, most states and legal systems recognize it to some extent—with differing exceptions.

The general rule under the MCCP is that the secondary evidence deriving from and tainted by other illegally obtained evidence should be excluded by the court if the circumstances set out in Paragraph 6(a) and (b) are found to exist. The first circumstance is that the evidence in question was obtained as a result of other evidence obtained illegally (e.g., on the basis of information deriving from illegal evidence). In other words, a causal link (sometimes known as a but-for link or a *condition sine qua non*) exists between the evidence in question and evidence that was obtained in violation of the MCCP or the applicable law. This alone does not lead to the exclusion of secondary evidence obtained from illegally obtained primary evidence. The drafters of the MCCP recognized that more was required to merit the exclusion of such secondary evidence. Without providing for an additional element to the exclusion of secondary evidence, for example, an arrested person who was not advised of his or her rights as required by the MCCP or was rejected access to a lawyer made an incriminating statement during interrogation could claim that any later incriminating statement or confession by him or her—even when given in accordance with the MCCP—has a link to initial illegality—is “a fruit of the poisonous tree”—and therefore must be excluded.

Hence, the MCCP introduces a second condition, which must also be found to exist before secondary evidence obtained from evidence that was illegally obtained can be excluded: derivative evidence must be obtained by “active exploitation” of the initial violation. This introduces a flexible standard open to court interpretation (it is also so in many states that adhere to the doctrine of exclusion of derivative evidence). In practice, derivative evidence could be admitted if the prosecution proves: (a) that secondary evidence could be obtained not only by exploiting initial violation but also by a parallel, “independent source” not tainted by illegality (e.g., even when probable cause for a house search was based on forced illegal confession, its results will not be excluded as fruits of such confession when probable cause for the search also existed on the basis of a witness statement or other legally obtained evidence); (b) that the evidence in question would ultimately or inevitably be discovered by lawful means; or (c) that the causal link between the initial violation and the evidence in question was sufficiently attenuated that the secondary evidence is not tainted by the initial violation (e.g., a second confession, given during the questioning conducted in accordance with the MCCP of a suspect whose first confession was illegally obtained, would not be

excluded if the police advised the suspect before the second confession that the first confession could not be used as evidence, or if the suspect were to be released and days after voluntarily gave another statement to the police).

Article 231: Handling of Excluded Evidence

1. When the court rules that certain evidence must be excluded under Article 230, such evidence will be removed from the court file and the court record. Excluded evidence must be sealed and stored separately from the court file.
2. Excluded evidence may be inspected only during an interlocutory appeal on exclusion of evidence under Article 295.

Article 232: Exclusion of Evidence Obtained through Torture or Cruel, Inhuman, or Degrading Treatment

Any statement that is established to have been made as a result of torture or cruel, inhuman, or degrading treatment must be excluded at trial, except at the trial of a person accused of the criminal offense of torture under Article 101 of the MCC.

Commentary

Article 15 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires that states ensure that any statement that is established to have been made as a result of torture shall not be invoked in evidence in any proceedings, except where those proceedings are against the person accused of torture. Similarly, Article 10 of the Inter-American Convention to Prevent and Punish Torture states that “no statement that is verified as having been obtained through torture shall be admissible as evidence in a legal proceeding, except in a legal action taken against a person or persons accused of having elicited it through acts of torture, and only as evidence that the accused obtained such statements by such means.” The United Nations Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment widens this standard to include “cruel, inhuman and degrading treatment.”

Article 12 of the Declaration provides that “any statement that is established to have been made as a result of torture, *or other cruel, inhuman or degrading treatment or punishment*, may not be invoked as evidence against the person concerned or against any other person in any proceedings.” The United Nations Human Rights Committee seconded the position taken in the United Nations Declaration, stating that “the law must prohibit the use of admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment” (General Comment no. 20, paragraph 12). Similarly, the African Commission on Human and Peoples’ Rights’ Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa says that states should “ensure that any statement obtained through the use of torture, cruel, inhuman or degrading treatment or punishment shall not be admissible as evidence in any proceedings except against persons accused of torture as evidence that the statement was made” (paragraph 29).

Article 232 introduces these international obligations into the MCCC by providing a complete ban on the inclusion of evidence obtained through torture or cruel, inhuman, or degrading treatment in proceedings against an accused person who has been subjected to this treatment. As such, Article 232 serves also to protect the right of the accused to freedom from torture or cruel, inhuman, or degrading treatment, as contained in Article 58 of the MCCC. In some states, there is almost an automatic recourse to torture as a way to gain evidence, particularly confession evidence. This is clearly bad practice and in violation of international human rights norms and standards. The exclusionary rule contained in Article 232 is thus both a valuable safeguard and a practical deterrent. For a fuller discussion on confession evidence, see the commentary accompanying Article 230(4) and (5). It is worth noting that Article 232 does not just protect the accused but applies to all statements elucidated by means of torture or cruel, inhuman, or degrading treatment.

Article 233: Exclusion of Evidence of Privileged Communications

1. Any written or other records relating to communications with the accused made by any of the persons listed in Article 243 and Article 244(1)(a)–(d) must be excluded from the evidence at trial.
2. Privileged communications under Paragraph 1 may be admitted into evidence at trial where the accused has consented in writing.
3. The content of the communications between the accused and any of the persons listed in Article 244(1)(a)–(d) may be admitted into evidence at trial where the accused has relayed the content of the communications to a third

party, and that third party then gives evidence of what has been relayed to him or her.

Commentary

Articles 243 and 244 list persons who are not required to testify at trial. The evidence of those persons is “privileged,” given the nature of their relationship with the accused person. These persons include the family members of the accused, the accused’s lawyer, a member of a religious clergy with whom the accused has consulted or confessed to, the accused’s psychiatrist or psychologist, and the accused’s doctor. Reference should be made to the commentaries to Articles 243 and 244 for further discussion on privileged communications.

Article 234: Exclusion of Privileged Information, Documents, or Other Evidence of the International Committee of the Red Cross (ICRC)

1. Any information, documents, or other evidence of the International Committee of the Red Cross (ICRC) that came into the possession of in the course of, or as a consequence of, the performance of its functions under the Statutes of the International Red Cross and Red Crescent Movement is privileged.
2. Privileged information, documents, or other evidence must be excluded from the evidence at trial.
3. If the trial court determines that the privileged information, documents, or other evidence is of great importance for the case, consultations must be held between the trial court and the ICRC in order to seek to resolve the matter by cooperative means, bearing in mind the following:
 - (a) the circumstances of the case;
 - (b) the relevance of the evidence sought;
 - (c) whether the evidence could be obtained from a source other than the ICRC;
 - (d) the interests of justice and of the victim; and
 - (e) the performance of the functions of the trial court and the ICRC.

4. The privileged information, documents, or other evidence may be admitted into evidence at trial if, after the consultations detailed in Paragraph 3:
 - (a) the ICRC does not object in writing to the admission of the evidence; or
 - (b) the ICRC otherwise waives its privilege.
5. Evidence contained in privileged information, documents, or other evidence of the ICRC may also be admitted into evidence at trial where:
 - (a) the same evidence has been obtained independently from a source other than the ICRC and its officials or employees; and
 - (b) the source obtained the evidence independently of the ICRC and its officials or employees.
6. Information, documents, or other evidence of the ICRC contained in public statements and documents may be admitted into evidence at trial without restrictions.

Commentary

The International Committee of the Red Cross (ICRC) is an independent humanitarian organization (see Article 1 of the Statute of the International Committee of the Red Cross). The ICRC has a number of roles, including those set out under the four Geneva Conventions of 1949. It also acts as a neutral organization that carries out humanitarian work in times of international and other armed conflict or internal strife to ensure the protection of and assistance to military and civilian victims of such events and of their direct results (Article 4, Statute of the International Committee of the Red Cross). Given the nature of its work, the ICRC often meets with both sides of the conflict, including state authorities, and its delegates are privy to sensitive or confidential information. The operation of the ICRC is premised on the notion of confidentiality. This notion is one of the core principles underpinning the ICRC and is the reason why all parties feel safe to work with the ICRC during conflict or internal strife. Given the importance of the work of the ICRC and the importance of confidentiality to the continued success of the ICRC's work, this notion must not be compromised in any way. The issue of testimony of ICRC delegates came up before the International Criminal Tribunal for the former Yugoslavia, where the principle of confidentiality was tested before the court. In the decision of *Prosecutor v. Simic* (UN document IT-95-P), the International Criminal Tribunal for the former Yugoslavia found that the ICRC had an absolute privilege against testifying under international law. Under the International Criminal Court Rules of Procedure and Evidence (Rule 73), this privilege has been restricted somewhat. This restricted privilege has been incorporated into the MCCP. For a fuller discussion on the ICRC privilege, reference should be made to "The ICRC Privilege Not to Testify: Confidentiality in Action," 845 *International Review of the Red Cross* (March 2002) (available at <http://www.icrc.org/Web/eng/siteeng0.nsf/html/59KCR4>).

Article 235: Exclusion of Evidence of Sexual Conduct

1. In sexual offenses cases, the following evidence of sexual conduct must be excluded at trial:
 - (a) evidence offered to prove that the alleged victim engaged in other sexual behavior; or
 - (b) evidence offered to prove the sexual predisposition of the alleged victim.
2. In sexual offenses cases, the following evidence is admissible:
 - (a) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence; and
 - (b) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or offered by the prosecution.
3. The party wishing to introduce evidence under Paragraph 2 must file a motion with the trial court prior to submitting the evidence in court.
4. Before admitting evidence under Paragraph 2, the trial court must set a time and date for a closed hearing and inform the prosecutor, the defense, and the victim in accordance with Article 27. The victim, the prosecutor, and the defense have a right to attend and be heard.
5. The closed hearing must be recorded in accordance with Article 37.
6. Information in the record of the closed session must be removed from the court file.
7. The information relating to the hearing and all other information, including the original motion, if any, for inclusion of the evidence of sexual conduct, must be sealed and stored in a secure place, under lock and separately from the court file.

Commentary

The laws surrounding the introduction of evidence of sexual conduct of the victim of a sexual offense vary around the world. In some states, there are no rules permitting the exclusion of evidence, which means that the defense often introduces evidence of the sexual conduct of a victim, for example, to prove that the victim was promiscuous in an attempt to discredit the victim's assertion that the illegal sexual behavior was not consensual. In other states, and under the International Criminal Court Rules of Procedure and Evidence (Rule 70[c]), there is a complete bar on the introduction of evidence relating to the prior sexual history of a victim. In the view of the drafters, neither of these provisions was suitable for inclusion in the MCCP. Allowing the defense to introduce any and all evidence of the sexual history of a victim, however irrelevant, is traumatic for the victim. In addition, even if the victim engaged in other sexual relationships in the past, that behavior often has no bearing on the present criminal trial. Even where a victim had many sexual relationships in the past, that behavior does not have a bearing on the victim's consent to a future sexual encounter. Sometimes victims are implicitly deemed to have consented to a sexual encounter merely because they did so in the past. On the other hand, the exclusion of all evidence of a victim's sexual history may mean that crucial evidence surrounding the victim's sexual history with the accused person may not be permitted, even if it is salient to the question of consent to another sexual encounter between the victim and the accused.

The MCCP adopts an approach between these two positions. The MCCP outright excludes the introduction of evidence of sexual conduct of the victim with anyone other than the accused person except as provided for in Paragraph 2(a). The MCCP also excludes the introduction of evidence relating to the sexual disposition of the alleged victim, for example, that the victim had engaged in many sexual relationships in the past. What may be introduced is evidence to prove that a person other than the accused was the source of semen, injury, or other physical injury. In this case, a party in the case would be alleging that a person other than the accused had sexual relations with the victim, whether lawful or unlawful, or that a person other than the accused injured the victim. The only other exception to the general rule set out in Paragraph 1 concerns evidence of specific instances of sexual behavior by the alleged victim with the alleged perpetrator.

In many post-conflict states, establishing accountability for crimes of sexual violence perpetrated in large numbers during and after the conflict is a sensitive and important societal priority. Putting in place rules and procedures that are protective of victims of these criminal offenses while respecting the rights of the accused is essential.

Evidence of sexual conduct cannot be introduced into court without a motion being filed by the party seeking to introduce it. The motion will be heard in closed session with both parties and the victim present. During the course of the hearing, the court will decide whether the exceptions set out in Paragraph 2 apply. Any evidence that comes from the closed hearing and any other information must be separated from the court record and the case file and securely stored away.

Article 236: Principles of Evidence in Cases Involving Sexual Violence

1. In cases involving sexual violence, where the prosecution or the defense wishes to raise the issue of consent of the victim, the relevant party must file a motion with the trial court in advance of submitting the evidence.
2. The trial court must hold a hearing under Article 237 upon receipt of a motion to introduce evidence related to the consent of the victim in a case involving sexual violence. The victim, and his or her legal counsel, may be present during the closed hearing.
3. In cases involving sexual violence, the trial court must be guided by and, where appropriate, must apply the following principles:
 - (a) consent must not be inferred by reason of any words or conduct of a victim where force, threat of force, coercion, or taking advantage of a coercive environment undermined the victim's ability to give voluntary and genuine consent;
 - (b) consent must not be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;
 - (c) consent must not be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; and
 - (d) credibility, character, or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim.

Commentary

The wording in Article 236 refers to *sexual violence*, which is taken to include all sexual offenses, including rape. Reference should be made to Section 3 of Part II: Special Part of the MCC on sexual offenses. With regard to the criminal offense of *rape*, as discussed in the commentary to Article 94 of the MCC, the lack of consent of the victim is not a constituent element of the offense. Nor is it an element of other sexual offenses contained in the MCC such as “Violation of the Sexual Autonomy of a Defenseless Person” (Article 96) or “Violation of Sexual Autonomy by Abuse of Authority” (Article 97). In spite of this, the issue of consent may be raised by the defense during a trial involving criminal offenses of a sexual nature. It is for this reason that Article 236 was included in the MCCP. This provision is derived from the Rules of Procedure and Evidence of the International Criminal Court.

Paragraph 3: The principles set out in Paragraph 3(a)–(c) all relate to the consent of the victim. It is important to reiterate that consent is not a substantive element of the criminal offenses set out in Section 3 of Part II: Special Part of the MCC, nor is it a defined defense against criminal offenses of a sexual nature under the MCC. Nonetheless, it may be raised by the accused. Where the definitions of sexual offenses in the legislation of a post-conflict state refer more directly to consent as an element of criminal offenses, such as rape, the principles in Paragraph 3 are an important complementary procedural element of the law.

Paragraph 3 addresses some fundamental issues relating to consent, most particularly where the defense argues that the words, conduct, lack of resistance, or silence of the victim amounts to consent. In some instances, words, conduct, lack of resistance, or silence relating to the sexual act may appear on their face to indicate consent, but closer examination reveals other factors that vitiate any claims that the victim properly consented. External circumstances or conduct such as force, coercion, or the perpetrator taking advantage of a coercive environment (which is particularly relevant where the sexual offense took place in the context of a conflict) may all unduly influence the victim. The court must look at the surrounding circumstances to determine whether the victim gave true consent. As stated in Paragraph 3(a) and (c), consent cannot be inferred from words or conduct where force, threat of force, or coercion was present, where the perpetrator took advantage of a coercive environment, or where the victim is incapable of giving genuine consent. Consent can also not be automatically inferred where the victim was silent or did not actively resist the sexual conduct.

Paragraph 3(d) addresses the issues of witness credibility, character, and predisposition. Often in cases involving sexual violence, the defense attempts to discredit the victim because of other sexual conduct the victim was part of previously or subsequent to the alleged criminal offense. In order to effectively implement this principle, Article 235 provides that all evidence of other sexual behavior (bar two discrete exceptions in Article 235[2]) must be excluded at trial. In addition, evidence of sexual predisposition must also be excluded.

Article 237: Hearing to Determine the Admissibility of Evidence

1. The trial court may, upon the motion of the prosecutor or the defense or of its own accord, order a hearing to rule on the admissibility, relevance, or exclusion of evidence.
2. The trial court must set a time and date for a hearing and inform the prosecutor and the defense in accordance with Article 27. The prosecutor and the defense have a right to attend and be heard at the hearing.

Article 238: Introduction of Books, Records, Documents, and Other Tangible Items into Evidence before the Court

1. Records of crime scene investigation, search of premises or persons, or seizure of items and documents; identity documents; technical recordings; books; records; and other documents that serve as evidence must be introduced during the trial so as to establish their content.
2. Their content must be briefly summarized by the competent judge, or the presiding judge of a panel of judges, for the purposes of the record of proceedings.
3. Other tangible items of evidence that serve as evidence may be introduced during the trial.
4. A description of the item of tangible evidence must be made by the judge, or the presiding judge of a panel of judges, for the purposes of the record of proceedings.
5. Books, records, or documents that are admitted into evidence at trial must, if possible, be submitted in the original.
6. All books, records, documents, or copies of originals submitted into evidence must be attached to the court case file.
7. All tangible items of evidence must be stored by the registry of the competent trial court once they are admitted into evidence before the court.

Commentary

During the course of the trial, both the prosecutor and the defense will call witnesses who will be examined, cross-examined, and reexamined as per Article 224. Each side will be building its case through witness testimony that will be entered into the court record. The court record provides the official record of the trial and all the evidence that was brought before the court during the trial. The judges must rely on the court record in determining the criminal responsibility of the accused. The judge or judges must also base their judgment on the court record. During the course of the trial, other sorts of evidence may also be entered into the court record. Certain documents, of the sort outlined in Paragraph 1, may provide valuable evidence. In order to enter such evidence into the court record, the judge or presiding judge must summarize their content for the record. These documents will move from the possession of the party entering them to the possession of the court, where they will be stored in the

court case file under Paragraph 6. Other tangible pieces of evidence may also be introduced into the court record at trial, for example, the gun or knife in a trial for “unlawful killing.” Such pieces of evidence must be described by the judge or the presiding judge and then entered into the record. After this, the court is charged with storing these pieces of evidence as required by Paragraph 7. Provision should be made in each courthouse for the storage of evidence. Rules and procedures will need to be developed around the retention of evidence to determine the length of time evidence should be retained, where it should be stored, who can have access to the evidence, and so on.

Part 4: Power of the Trial Court to Order Additional Evidence

General Commentary

As discussed in the general commentary to Section 2, the level of judicial involvement in the introduction of evidence and examining of witnesses varies from state to state. In some states, the judge, acting as an inquisitor, will have access to the evidence in advance and will essentially lead the trial, leading the questioning of witnesses and introducing evidence. In other systems, the judge is more of a referee and a passive observer of party-led proceedings. Under the MCCP, the parties, namely, the prosecution and the defense, lead the proceedings; however, the judge does not merely have a passive role. Part 4 endows the judge or panel of judges with powers relating to the introduction of evidence, the summoning of witnesses, and the commencement of other sorts of investigations pertinent to the trial. The judge may adopt a more active role in ensuring that evidence that may be valuable to the accused is introduced. Under Article 239, the court may generally order the introduction of *evidence*, as defined in Article 1(19). It may summons witnesses who have not been called by either side to appear (Article 239), as well as order the reenactment of a criminal offense (Article 240) and the medical examination or the examination of the mental state of the accused (Article 241).

Article 239: Power of the Court to Order the Production of Additional Evidence

1. The trial court has the power to order the production of evidence that it deems relevant to the proceedings.
2. The trial court has the power to summons witnesses to appear before the court, other than those called by the prosecutor and the defense.

Article 240: Power of the Court to Order the Reenactment of a Criminal Offense

1. The trial court may, of its own accord or upon the motion of the prosecutor or the defense, order the reenactment of the criminal offense at the crime scene.
2. Where a reenactment of the criminal offense is ordered, the prosecutor and the defense must be present during the reenactment.

Article 241: Power of the Court to Order a Medical Examination or Examination of the Mental State or Mental Incapacity of the Accused

1. The trial court may, of its own motion, order a medical examination of the accused and appoint a medical expert to conduct the examination.
2. The trial court may, of its own motion, order an examination of the mental state of the accused in accordance with Article 144, or an assessment of the mental capacity of an accused under Article 89.

Commentary

Reference should be made to Articles 89 and 147.

Part 5: Witnesses and Witness Testimony before the Court

Section 1: Obligation on Witnesses to Testify before the Trial Court

Article 242: Obligation on Witnesses to Testify before the Court

Except as otherwise provided for in the MCCP, all witnesses are obliged to testify before the trial court when summonsed by the court in accordance with Article 32 or 33.

Section 2: Persons Not Required to Testify before the Trial Court

General Commentary

It is common practice for domestic criminal procedure laws to lay out certain categories of persons who are not required to testify at trial. These persons are excused because of the nature of the relationship that they have with the accused. These relationships are “protected,” and the persons in these relationships are also protected. The most commonly excluded category of persons is family members of the accused and the lawyer for the accused. Religious clergy (e.g., imams, rabbis, priests, or monks) who have a relationship with the accused are also generally considered privileged. The treatment of the relationship between doctors, psychiatrists, and psychologists and the accused varies from state to state. In some states, the relationship is considered sacred; however, over time, other states have moved to end the protection in certain circumstances where public policy reasons outweigh the need to ensure the continuation of this protected relationship. In other states, public policy reasons have led to the amendment of rules on other privileged relationships. For example, in some states, given the public policy need to combat domestic violence, the husband-wife privilege has been obliterated in cases concerning domestic violence against a wife. Privileges have also been obliterated where one party to an otherwise privileged relationship is the victim of the criminal offense allegedly committed by the accused person. The same goes for cases where the accused is charged with very serious crimes. Under the MCCP, a family member may revoke the privilege under Article 243. With regard to other privileged communications contained in Article 244, the privilege may be revoked when

the accused consents or where the accused has relayed information to a third party, who then testifies about the information (see Article 233[3]).

Article 243: Family Members of the Accused Not Required to Testify

1. The spouse, parents, children, and adopted children of the accused are not required to testify against the accused.
2. The spouse, parent, child, or adopted child of the accused may choose to testify against the accused.

Commentary

The privilege set out in Article 243 belongs to the witness, but he or she may revoke it. As provided for in Paragraph 2, the family member may choose to testify against the accused. The drafters of the Model Codes considered a number of variations on the testimonial privilege of family members. In the end, the drafters decided on the most widely accepted formulation. In drafting new provisions on privileged communications, a state may wish to consider aligning with the trend discussed in the general commentary toward diminishing the absoluteness of the privilege. For example, some states have revoked the traditional privilege in the case of serious crimes or where the family member is a victim of the criminal offense.

Article 244: Other Persons Not Required to Testify

1. The following persons are not required to testify at trial about communications with the accused, and may not do so without the consent of the accused:
 - (a) defense counsel for the accused, with respect to facts that became known to him or her in his or her capacity as defense counsel;
 - (b) a member of a religious clergy, in relation to communications made by the accused in the context of spiritual consultation or sacred confession;

- (c) the psychiatrist or psychologist of the accused; or
 - (d) the doctor of the accused.
2. The accused may consent in writing to his or her counsel, religious counselor, psychiatrist, psychologist, or doctor testifying at trial.
 3. Any written records relating to communication with the accused are privileged.

Commentary

In addition to the family members not required to testify during the trial under Article 243, Article 244 contains categories of persons who cannot give evidence at trial without the permission of the accused. The categories of persons who are excluded from testifying in court in the absence of the accused's consent vary from state to state. The categories contained in the MCCP were arrived at after a survey of similar provisions from around the world, followed by extensive discussions by the drafters of the MCCP. What the drafters came up with were a number of generally agreed-upon categories. The use of the term *religious clergy* in Paragraph 1(b) is taken to include priests, monks, imams, rabbis, and other religious or spiritual clergy members.

Paragraph 3 deems that any written records related to communication with the accused are privileged. So, for example, where the accused has had a consultation with a psychiatrist, neither the defense nor the prosecution can request and submit the records of the session into evidence in court, except with the written consent of the accused. Reference should be made to Article 233(3), which provides that evidence of privileged communications may be admitted into evidence where the accused has relayed the information to a third party who then testifies at the trial.

Section 3: Failure of a Witness or Expert Witness to Appear before the Trial Court

Article 245: Consequences of Failure of a Witness or Expert Witness to Appear before the Trial Court

1. If a witness or expert witness who has been summonsed to appear at trial under Article 33 or 34 fails to appear before the court and does not justify his

or her absence, the court may order the witness or expert witness to be brought before the court by way of an apprehension order under Article 35.

2. When a witness is brought before the court as provided for in Paragraph 1, the court may issue an order for noncompliance with a court order under Article 41 against a witness or expert witness who fails to appear before the court when summoned to do so.
3. Where a witness or an expert witness fails to appear before the court, the court may adjourn the trial under Article 225.

Commentary

Where a witness fails to appear before the court when summonsed to do so, the first step the court may take is to issue an apprehension order under Article 35. The police will then be legally empowered to bring the witness or expert witness before the court. Once the witness is brought before the court, the court may issue an order for non-compliance with a court order, under which a person may be detained or fined for noncompliance with the court-ordered summons issued against him or her. As another option, a witness or expert witness who fails to appear before the court when summonsed to do so may be prosecuted for the offense of “failure to respect an order of the court” under Article 197 of the MCC. It falls within the power of the prosecutor, rather than the court, to prosecute a person for this offense, although the court could recommend the prosecutor to do so.

Section 4: The Accused as a Witness

Article 246: The Accused as a Witness

The accused is not obliged to but may appear as a witness in his or her defense.

Commentary

The accused may make a statement after the opening statements of both the prosecutor and the defense. This statement is not made under the solemn declaration that witnesses are required to take under Article 246. Where an unsworn statement is made by the accused under Article 246, the judge or the panel of judges must decide on the probative value of the statement. The unsworn statement made by the accused is not subject to cross-examination by the prosecutor. Obviously, a statement made by the

accused as a witness, which is pursuant to a solemn declaration, and that can be examined by the prosecutor will have higher probative value than an unsworn and uncontested statement.

Section 5: Solemn Declaration of a Witness and Declaration of Preliminary Information

General Commentary

Prior to a witness testifying before the court, he or she must make a solemn declaration or an oath stating officially before the court that he or she will tell the truth. Once the witness has been sworn in, or made the solemn declaration, the witness must answer the questions put to him or her by the prosecutor, the defense, or the judge. This obligation is subject to the other provisions of the MCCP, however; for example, a person does not have to answer any question that would impinge upon his or her right to freedom from self-incrimination as set out in Article 57. In addition, where the person is subject to protective measures or anonymity, the extent of testimony required from the witness may also be limited by the court under Article 254.

Article 247: Solemn Declaration

1. Prior to testifying, a witness must make the following solemn declaration: “I solemnly declare to tell the truth, the whole truth, and nothing but the truth.”
2. A witness may use the sacred texts of his or her faith to take the oath.

Article 248: Solemn Declaration of a Child Witness

1. A child who, in the opinion of the trial court, understands the nature of the solemn declaration must make the solemn declaration under Article 248.
2. The trial court may permit a child who does not understand the nature of the solemn declaration to testify without making the declaration where, upon inquiry, the court is of the opinion that the child is sufficiently mature to be

able to report the facts of which the child had knowledge and understands the duty to tell the truth.

3. The trial court must decide on the probative value, if any, of the statement of a child witness who has not made the solemn declaration under Article 247.

Commentary

A child witness, meaning a witness under the age of eighteen years, cannot automatically make a solemn declaration prior to testifying before the court. Where the court is confronted with a child witness, it must assess whether the child understands the nature and implications of making such a declaration. This assessment is usually done by questioning the child. Where the court determines that the child understands the nature of the declaration, the child must make the declaration and will be able to give evidence under oath. Where the child does not understand the nature of the solemn declaration, the court may still allow the child to testify not under oath, if it determines that the child can report the facts that the child has knowledge of and he or she understands the duty to tell the truth. Reference should be made to Article 263, which provides that a person cannot be convicted solely upon the basis of the testimony of a child witness who has not made a solemn declaration.

Article 249: Solemn Declaration of a Mute or Deaf Witness

1. Mute witnesses who are literate must take the solemn oath by signing the text of the oath.
2. Deaf witnesses must read the text of the oath.

Article 250: Preliminary Information

1. Subject to any witness protection order or an order for witness anonymity, after the solemn declaration the court must ask the witness to state for the record his or her:
 - (a) first name and surname;
 - (b) occupation;

- (c) address;
 - (d) place and date of birth; and
 - (e) relation to the accused or a victim of the criminal offense, if any.
2. The witness must also be warned that he or she must report to the court any change in his or her address.

Section 6: Freedom from Self-Incrimination of a Witness and Warnings Issued by the Court

Article 251: Freedom from Self-Incrimination

1. No witness may be compelled to incriminate himself or herself.
2. A witness is not required to answer any question that would incriminate himself or herself.
3. If it appears to the judge, or to the presiding judge of a panel of judges, that a question asked of a witness is likely to elicit a response that might incriminate the witness, the judge must advise the witness of his or her right not to answer the question.

Commentary

The privilege against self-incrimination is provided for the benefit of the suspect or the accused under Article 47. Article 57 concerns a witness and is therefore distinct. In some states, witnesses do not benefit from the privilege against self-incrimination. This privilege applies only to suspects and accused persons. In other systems, the witness must testify but has the right not to have any incriminating evidence used against him or her in other proceedings (this is known as “use immunity” and is discussed in relation to cooperative witnesses in the commentary to Chapter 8, Part 4, Section 3). In yet other states, the witness has the full privilege against self-incrimination. The drafters of the M CCP chose to include a full privilege against self-incrimination for a witness, which means that when testifying in court, a witness may refuse to answer any question put to him or her if it would violate his or her privilege against self-incrimination. A person other than the suspect or the accused who is being questioned by the police and the prosecutor (and may or may not act as a witness during the trial) is also afforded the privilege against self-incrimination. Reference should be made to Article 110.

Article 252: Warnings Issued by the Court

1. After a witness has made a solemn declaration and after the witness has given the court preliminary information, the trial court must instruct the witness of his or her duty to speak the truth and that he or she may not withhold anything, whereupon the witness must be warned that false testimony is a criminal offense under Article 192 of the MCC.
2. The trial court must instruct the witness that he or she is under a duty to answer any questions posed to him or her subject to Articles 251, 254, and 255.
3. If a witness is anonymous or is subject to a protective measure and is testifying behind a screen, the presiding judge must verify that it is the same witness for which anonymity or witness protection was granted. This verification must be entered in the court record.

Commentary

Paragraph 3: Paragraph 3 is crucial to ensuring that a substitute witness is not placed on the witness stand to testify in lieu of the actual witness.

Section 7: Requirement of Absence of a Witness during Testimony of Another Witness

Article 253: Absence of a Witness during Testimony of Another Witness

1. A witness other than an expert witness who has not yet testified must not be present when another witness is testifying.
2. A witness who has heard the testimony of another witness must not for that reason alone be disqualified from testifying.

Commentary

The purpose in requiring that a witness who is yet to testify not be present during the questioning of another witness is to ensure that the incoming witness is not influenced by the testimony of other witnesses. However, the presence of a witness during the trial, whether accidental or otherwise, cannot be used as a sole ground to disqualify a witness. Where a witness has been present during the testimony of other witnesses, the court may take this into account when determining the probative value of his or her testimony.

Section 8: Measures for the Protection of Witnesses Testifying before the Court

Article 254: Protection of Witnesses during a Trial

1. The trial court must take appropriate measures to protect the safety, physical, and psychological well-being, dignity, and privacy of witnesses during the trial. In doing so, regard must be had for all relevant factors, including age, gender, health, religion, and the nature of the criminal offense, especially where the criminal offense involves sexual or gender violence or violence against children.
2. The trial court may, of its own accord or at the motion of the prosecutor, the defense, or a witness, make an order for protective measures for witnesses under threat or vulnerable witnesses under Chapter 8, Part 4, Section 2 or an order for anonymity for witnesses under threat under Chapter 8, Part 4, Section 2.
3. Where an order for anonymity has been granted under Chapter 8, Part 4, Section 2, the trial court must prohibit all questions the answers to which could reveal the identity of the witness or the restricted information. The defense may, however, examine the witness on all other issues permissible under the M CCP.
4. The trial court must strike from the court record any statements made by an anonymous witness that inadvertently or mistakenly reveals his or her identity in response to a question.

Commentary

The judge or panel of judges presiding over a trial is charged with ensuring the safety, physical and psychological well-being, dignity, and privacy of witnesses during the course of the trial, especially where the criminal offenses involve sexual or gender violence or violence against children. This goal may be achieved, for example, by controlling the questioning to limit the level of harassment or intimidation of the witness as provided for under Article 254. In some instances, the court may need to go further. Under Articles 147–155 and 156–162 of the M CCP, respectively, the court may make an order for protective measures or witness anonymity. Article 254 gives the trial court the power to order these measures of its own accord, where the prosecutor, the defense, or the witness has not filed a motion with the court.

Where an anonymous witness (as defined in Article 156) is testifying during the trial, the court has the responsibility to ensure that no details surrounding the identity or whereabouts of the anonymous witness are revealed to the defense or to the public or press. Thus, the court must play a strict role in overseeing the line of questioning pursued by the defense and the prosecutor and strike from the official court record any statements that might reveal the identity or whereabouts of the anonymous witness.

Article 255: Control of Questioning of Witnesses by the Trial Court

1. The trial court must, whenever necessary, control the manner of questioning to avoid any harassment or intimidation of witnesses.
2. The trial court must forbid repetitious or irrelevant questions, as well as answers to such questions.

Section 9: Measures to Protect Child Witnesses Testifying before the Court

Article 256: Questioning of a Child Witness

1. The court must ensure that a child witness is examined considerably to avoid producing a harmful effect on his or her state of mind.
2. If necessary, a child psychologist or child counselor or some other expert may be called to assist in the examination of a child witness.

Commentary

For a child (meaning a person under the age of eighteen years as defined in Article 1[5]), testifying at a trial can be an overwhelming and traumatic experience. A sensitive approach must be adopted toward child witnesses and victims. According to the *Guidelines on Justice for Child Victims and Witnesses of Crime* (UN document E/2004/INF/2/Add.2, developed by the International Bureau for Child's Rights), "child-sensitive denotes an approach which takes into account the child's individual needs and wishes" (paragraph 9[d]). There are numerous elements to a child-sensitive approach to child victims and witnesses, all of which are set out in the guidelines and should be referred to. These elements may include implementing protective measures for child witnesses. Reference should be made to Articles 147–155 and their accompanying commentary on protective measures for witnesses under threat.

The court must be alert to protecting the rights and interests of children and to protecting them from harm. When a child is testifying, the child has the right to be protected from justice-process hardship, which means that the child should be provided with support throughout the process (see paragraphs 23–26 of the guidelines), including a child psychologist, child counselor, or some other person with expertise in dealing with children. The child psychologist, counselor, or other expert may be provided by the state, although their provision may be difficult in terms of resources in a post-conflict state. Alternatively, the court system may enter into an agreement with a civil society or non-governmental organization specializing in children's rights that may work with the court in the support of child witnesses. In some states, paralegals undertake this role, providing support and assisting in the preparation of child witnesses for court. In terms of lessening the harmful experience of a trial for a child witness, in some states, legal professionals, including judges, are required to remove robes and other formal attire usually required in court in order to make the experience less intimidating. This is not expressly provided for in the MCCP but is a matter of good practice where court personnel are otherwise required to wear formal attire, such as

wigs and gowns. During the questions, the child must be treated with dignity and compassion (paragraph II[A] of the guidelines). Child-sensitive questioning requires questioning the child in a language that the child uses and understands (paragraph 14) and conducting questioning and interviews in a “sensitive, respectful and thorough manner” (paragraph 13).

In addition to the provisions of Article 256 for the protection of child witnesses, the MCCP contains another mechanism to protect children. Under Articles 147–155, a child may be declared a vulnerable witness and protective measures may be ordered for the child witness. The measures that may be ordered in favor of the child witness are contained in Article 147. Reference should be made to Articles 147–155 and their accompanying commentaries for further discussion on the protection of a child witness/vulnerable witness.

Section 10: Testimony before the Trial Court and Its Exceptions

Article 257: General Principle of Live and Direct Testimony of Witnesses

Except as otherwise provided in the MCCP, a witness must be heard directly by the trial court.

Commentary

In some legal systems, witness statements may be introduced into evidence without the witness being present at trial to testify. This occurs mostly where the witness statement was obtained through the questioning of a witness by an investigating judge. The defense may have also been present during the taking of the statement to safeguard the right of the accused. In other legal systems, and in the MCCP, the general rule is that a witness must be heard directly before the court. To put it simply, the witness must come before the court and testify “live.” In this way, the prosecutor, the defense, and the court (and counsel for the victim if the court has given the victim the opportunity to participate in proceedings under Article 76) will be able to question the witness in person and directly observe the demeanor of the witness.

There are a number of exceptions in the MCCP to the general principle in Article 257. The first exception involves live testimony that takes place in a location other than the courtroom. Article 174 allows a person who has been declared to be either a witness under threat or a vulnerable witness to testify in a location other than the courtroom. For example, a witness may be subject to protective measures under Article 147(e) that allow the witness to testify from another location by means of closed-

circuit television. The second exception to the general rule in Article 257 involves the introduction of evidence that has been previously recorded. There is the option under the protective measures regime to allow for the introduction of prerecorded videotaped evidence (see Article 147[e]). In addition, a unique investigative opportunity under Article 146 allows a court-ordered examination of a witness prior to trial if obtaining the attendance of the witness at trial is impossible. Where the prerecorded evidence of a witness is being introduced at trial—whether under a protective measure or by way of a unique investigative opportunity—the MCCP requires that both parties be present at the time the testimony is taken to examine the witness. This protects the accused’s right to examine a witness against him or her set out in Article 64 of the MCCP. Article 258 provides another exception to the principle of live and direct witness testimony.

Article 258: Exceptions to the General Principle of Live and Direct Testimony of Witnesses

1. The testimony or statements of a witness that are made out of court may be read during the trial where both the prosecutor and the defense consent.
2. In exceptional circumstances, and where a protective measures order in favor of a witness is not in place, the trial court may, upon the motion of the prosecutor or the defense, permit a witness to give testimony by way of live audio or video technology provided that the prosecutor, the defense, and the court have the opportunity to examine the witness.
3. In exceptional circumstances, and where a unique investigative opportunity has not been ordered, the trial court may allow, upon the motion of the prosecutor or the defense, the introduction of:
 - (a) previously recorded audio or video testimony of a witness; or
 - (b) a transcript or other documented evidence of witness testimony.

Commentary

Paragraph 1: Paragraph 1 provides a general exception to Article 257 where both parties consent to the introduction of witness statements or testimony. Because the accused has consented to the introduction of this evidence, he or she has waived his or her right to examine the witness and therefore it is not a violation of rights to introduce such testimony.

Paragraph 2: Paragraph 2 provides an exception to the requirement that a person give evidence directly before the court. It allows for either side to request the court, exceptionally, to allow a witness (who is not already subject to witness protection measures) to give testimony at another location. This may be because the person is in a foreign location and cannot make it to the trial, for example, or severe logistical issues prevent bringing the witness to court (e.g., a witness who is a dangerous prisoner in a high-security prison). Although it is preferable for the accused that the witness appear directly before the court so that the defense can fully examine his or her demeanor, the giving of evidence by a witness in another location does not severely encroach upon the rights of the accused to examine a witness. This is not to say that the court should automatically grant this measure. This is an exceptional measure, and the party seeking to have its witness testify at another location must make a strong case to the court as to why the witness's presence in the courtroom is not necessary. The party must also demonstrate to the court why it did not seek other measures to achieve this end. For example, where the prosecutor seeks to have a witness testify at another location because the witness is intimidated, the court would be at liberty to question why the prosecutor did not seek a protective measures order instead. The court may require that the prosecutor does so instead of granting the prosecutor's request under this paragraph.

Paragraph 3: The purpose of Paragraph 3 is to address the question of an absent witness, where the witness is absent and a unique investigative opportunity has not already been obtained to preserve the testimony of the person for submission during the trial. A witness may be absent because he or she is dead, is too ill to attend the proceedings, is abroad, or cannot be found. Systems differ as to how they treat absent witnesses. In some systems, there is a general bar on the introduction of the testimony of absent witnesses. Other systems allow the prior statements of absent witnesses to be introduced, but only where such statements are corroborated by other testimony or evidence. Yet other systems have adopted a different position, as discussed in the commentary to Article 257, where prior witness testimony may generally be introduced at trial.

Some experts argue that prior witness testimony should not be introduced at all. First, it is impossible to test the reliability of such statements, and second, it deprives the accused of his or her right to examine the witness as set out in international human rights law (and under Article 64 of the MCCP). In systems that have detailed hearsay evidence ("hearsay" is a statement other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted), the use of prior witness testimony amounts to hearsay and therefore is not, in principle, permissible. That said, even in many states that have hearsay rules, exceptions have been made to allow for the introduction of hearsay evidence. Some experts argue that the evidence of absent witnesses must be allowed to be presented to the court; otherwise, valuable evidence could be lost.

The drafters of the MCCP, in considering what provision to adopt on absent witnesses, debated the various options available. Ultimately, the drafters concluded that there should be a mechanism to deviate from the general principle of "live testimony" in certain defined instances and to allow for the introduction of prerecorded evidence before a court. This measure, however, should be exceptional; where such evidence is introduced, both the prosecutor and the defense should have had the opportunity to examine the witness. The drafters thought that the latter safeguard was essential to

protect the rights of the accused to examine the witness and that it was a vital safeguard to test the reliability of such statements.

Where the court is considering whether to allow the introduction of prerecorded testimony, it must assess whether the testimony could be obtained through less severe measures. For example, where a witness is absent because he or she is in a different state, it may be feasible to provide for testimony by way of live video link instead of prerecorded testimony.

It must also be noted that Article 258 refers to testimonial evidence of witnesses only. Thus, Article 258 relates to the introduction of prerecorded evidence given by the accused in a testimonial capacity. There is no clear definition of what “testimony” is. In some states, a statement is testimonial where the statement is made in an investigative environment in an effort to assist authorities to apprehend and prosecute a suspect. Whether or not the witness is under oath while making a statement will have a great bearing on whether a statement is testimonial; however, a phone call to the emergency services by an absent witness to report the commission of a criminal offense is classified as testimonial in some jurisdictions.

Although a provision that the court must not rely solely or to a decisive extent on the evidence of a sole absent witness to convict a person is not contained in the M CCP, drafters of new criminal procedure laws may wish to consider it. This standard comes from the European Court of Human Rights case of *Unterpertinger v. Austria* (application no. 9120/80), which states that a case should not be entirely based on evidence from an absent witness unless other evidence submitted supports the veracity of the evidence or otherwise corroborates it.

Section 11: Presentation of Prior Statements and Other Evidence to a Witness during the Trial

Article 259: Presentation of Prior Statements to the Witness during the Trial

Statements of a witness made prior to the trial may be used during the trial to refresh the recollection of the witness who made them.

Commentary

A prior statement taken from a witness during the investigation of a criminal offense cannot be entered into evidence as a general rule under the M CCP. Under the principle of live testimony set out in Article 257, the witness is required to come to court and testify before the judge or panel of judges, subject to the exceptions contained in Arti-

cle 258 and elsewhere in the M CCP. During the course of live testimony, the witness may make a statement that is different from what he or she made during the investigation of the criminal offense, or the witness may have forgotten key elements of his or her earlier evidence. In such a case, either party may “refresh the recollection of the witness who made them” by reading the prior statement of the witness. The witness statement will not be entered directly into evidence, but the witness’s responses to it and the relevant parts that were read to the witness will. The use of prior statements is central to the impeachment of a witness under Article 261(2)(b).

Article 260: Presentation of Physical or Documentary Evidence to the Witness during the Trial

Physical or documentary evidence collected during the investigation may be presented to a witness during his or her testimony so that the witness can identify such evidence and testify as to its relevance.

Section 12: Impeachment of a Witness

Article 261: Impeachment of a Witness

1. A witness or expert witness may be impeached by any party, including the party calling the witness.
2. A witness may be impeached on the following grounds:
 - (a) the witness is biased in favor of one party or the other;
 - (b) the witness has made a prior statement that conflicts with his or her testimony at the trial;
 - (c) the witness has been induced in testimony to have contradicted himself or herself during his or her testimony in court;
 - (d) the witness has a community-recognizable reputation for dishonesty; or
 - (e) the witness is suspected or accused of another criminal offense.

Commentary

Witness impeachment refers to a deliberate act by either the prosecutor or the defense to discredit a witness by calling into question the witness's credibility. Impeachment can be done by introducing evidence through the cross-examination of the witness whose credibility has been called into question, or even by introducing testimony of another witness. Paragraph 2 incorporates the most commonly recognized grounds of impeachment contained in domestic criminal procedure codes around the world. Under Paragraph 2(a), a witness may be impeached because they are biased against one party or in favor of another. In addition, a witness may have a personal interest in the outcome of the case. For example, the defense may try to impeach a prosecution witness who has entered into a plea agreement with the prosecutor. The testimony of an impeached witness will carry less weight with the court than the evidence of a witness whose credibility has not been called into question.

Section 13: Compensation of Witnesses Summoned before the Trial Court

Article 262: Compensation of Witnesses

A witness who is summonsed to appear before the trial court must be compensated for his or her reasonable expenses.

Commentary

The compensation of witnesses should be done through the registry of the court and should be regulated by a standard operating procedure or a circular issued by the president of the courts in the state concerned.

Part 6: Deliberations and Judgment

Article 263: Deliberations of the Trial Court

1. After the hearing is declared over, the judge or panel of judges must deliberate in private.
2. In the deliberations of a panel of judges, each judge must vote separately on each count contained in the indictment. If two or more accused persons are tried together under Article 193, separate findings must be made for each accused person.
3. The accused must not be convicted of a criminal offense that was not included in the indictment.
4. A lesser included offense of a criminal offense stated in the indictment is deemed to be included in the indictment.
5. A verdict of “criminally responsible” or “not criminally responsible” on each count in the indictment must be rendered by a majority vote.
6. A verdict of “criminally responsible” on a count in the indictment must not be rendered by a judge or panel of judges unless the judge or panel of judges is certain that criminal responsibility has been proven by the prosecutor beyond reasonable doubt with respect to that count.
7. In reaching a decision on the criminal responsibility of the accused, a judge or panel of judges must not find the accused criminally responsible based solely or, in the absence of corroborating evidence, to a decisive extent on:
 - (a) the evidence of a sole anonymous witness;
 - (b) the evidence of a sole cooperative witness;
 - (c) the evidence of a child, where the child testified without making a solemn declaration; or
 - (d) a statement or confession given to the police or the prosecutor.

Commentary

After the procedures set out in Part 5 have been completed, the judge or panel of judges must begin deliberations. Ultimately, the purpose of deliberations is to render a verdict on whether the accused person is “criminally responsible” (i.e., guilty) or “not criminally responsible” (i.e., not guilty). The judge or panel must go through the indictment charge by charge and vote on whether they believe that the prosecutor proved beyond a reasonable doubt that the accused committed the criminal offense. Where there is a panel of three judges, the votes of two judges will suffice to convict.

Paragraph 4: A “lesser included offense” is an offense that is composed of some, but not all, of the elements of a more serious crime. For example, to unlawfully kill or murder someone, it is necessary to commit an assault on that person. Assault is an element of unlawful killing under Article 89 of the MCC but the offense goes beyond assault. Where a person is charged with “unlawful killing” but the judge or panel of judges finds that all the elements of unlawful killing set out in Article 89 are not proven, the judge or panel may still find the person guilty of the lesser included offense of assault. This option is available even where the prosecutor did not expressly charge the person with assault. Thus, if a person is charged with unlawful killing, it is presumed that he or she can be convicted of assault, without this being written into the indictment.

Paragraph 7(a): As discussed in the commentaries to Articles 156–162, where a court orders the use of anonymous witnesses, it must do so with the utmost respect for the rights of the accused person. The use of anonymous witnesses involves a delicate balancing act between the rights of the accused to confront a witness against him or her (Article 64 of the M CCP) and the rights of the witness or victim to be protected during the proceedings. One of the safeguards in the use of anonymous witnesses that has been elaborated by the European Court of Human Rights is that the testimony of a sole anonymous witness may not be used to convict an accused person. In the cases of *Unterpertinger v. Austria* (application no. 9120/80 110 ECHR, ser. A [1986] [November 24 1986]) and *Kostovski v. The Netherlands* (166 ECHR, ser. A [1989]), the European Court found a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms where the accused was convicted on the basis of a sole anonymous witness.

Paragraph 7(b): The use of cooperative witnesses, as with that of anonymous witnesses, must be undertaken carefully with full respect for the rights of the accused. The cooperative witness mechanism provided for in Articles 163–168 has the potential to be abused. Therefore, it should be carefully regulated, and sufficient safeguards should be introduced to ensure that the rights of the accused are not unduly compromised through its use. In much the same way as for anonymous witnesses, the M CCP provides that the evidence of a sole cooperative witness may not be used on its own to secure the conviction of an accused person.

Paragraph 7(c): A child who has testified without making a solemn declaration will have been found to not understand the declaration’s nature but will have been found

to understand the facts as per Article 248 and to understand his or her obligation to tell the truth. Given that this testimony comes from a child who has not taken an oath, the testimony should not be given the same weight as testimony delivered under oath. Paragraph 7(c) provides that the evidence of a child who has not taken a solemn oath must not be used as the sole basis for a conviction.

Paragraph 7(d): As discussed in the commentary to Article 232, the drafters of the MCCC sought to ensure that the MCCC contained sufficient safeguards to protect the right of the suspect and the accused to be free from any potential torture or cruel, inhuman, or degrading treatment (as contained in Article 58) or any acts of coercion that may impinge upon the rights of the suspect or the accused to freedom from self-incrimination (as provided for under Article 57). In many states, automatic recourse is often made to torture or cruel, inhuman, or degrading treatment or other means of coercion to secure a confession. A person may then be convicted on the sole basis of an illegally obtained confession. Article 232 requires that all evidence obtained through torture or cruel, inhuman, or degrading treatment be excluded from evidence. In order to reinforce this protection, to deter this sort of practice, and to protect the accused, Paragraph 7(d) requires that the judge or panel of judges not base any conviction solely on the basis of a confession.

Article 264: Pronouncement of the Judgment

1. The judge or panel of judges, after reaching a verdict during deliberations, must set a date and time for the pronouncement of the judgment in the case.
2. The prosecutor and defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The judgment must be pronounced in public, except where the interests of a child require otherwise, as provided for in Article 62.
4. The judgment must be pronounced in the presence of the accused, subject to Article 214.
5. The judgment must be pronounced by the judge, or the presiding judge, who must read aloud the indictment to the accused and must indicate in open court whether the accused has been found “criminally responsible” or “not criminally responsible” on each count of the indictment.
6. Where the accused person has been found “criminally responsible” of a criminal offense or offenses, the judge or the presiding judge must set a time and date for a separate hearing on penalties. The prosecutor and the defense must

be notified of the date and time of the hearing in accordance with Article 27. Notice must also be served upon the victim in accordance with Article 75(1).

7. When the accused is found “not criminally responsible” of a criminal offense, the court must order the person released immediately subject to Article 265. Any restrictive measure imposed upon the person must also be cancelled under the order of the trial court.

Commentary

Paragraph 4: The accused person has the right to be present during the trial, including at the pronouncement of the judgment. This right, and its exceptions, are set out in Article 214.

Paragraph 6: The MCCC provides for a bifurcated procedure, meaning that the trial and the pronouncement of penalties occur at different hearings. This was introduced as a means to protect the rights of the accused. The bifurcated nature of proceedings is discussed in more detail in the commentary to Article 267.

Article 265: Status of an Acquitted Person

1. If, at the time of pronouncement of a judgment of “not criminally responsible,” the prosecutor advises the trial court in open court of his or her intention to file an appeal statement under Article 277, the trial court may at the request of the prosecutor issue a warrant for the detention of the accused, for bail, or for restrictive measures other than detention, if the conditions under Articles 177, 179, or 184 are met.
2. A warrant for detention, bail, or restrictive measures other than detention takes effect immediately.

Commentary

Where an accused person is acquitted at the pronouncement of the judgment under Article 264, technically he or she is no longer an accused and therefore should be released from detention or allowed to continue to remain free, as the case may be. There is a slight exception to this general rule. Article 274 of the MCCC allows the prosecutor to appeal a decision of the trial court that finds the accused person to be “not criminally responsible.” Where the person acquitted of the criminal offense has been detained or subject to detention, bail, or restrictive measures other than deten-

tion prior to and during the trial, the prosecutor, after making a declaration in court that he or she intends to appeal the decision of the court under Article 277, may ask the court to continue the detention, bail, or restrictive measures. As discussed in the commentaries to Article 172 and Article 184, the purpose of these measures is to ensure the appearance of the accused before the court. The use of detention under Article 177 has a slightly broader application and serves not only to potentially ensure the presence of the accused at trial but also to protect the integrity of the evidence, any witnesses or other persons, or more generally public safety. In order to ensure that the acquitted person appear before the court during the appeal, that he or she not interfere with evidence or witnesses, or that he or she not cause a danger to public safety pending the appeal, the court may order the continuation of detention, bail, or restrictive measures other than detention. The order will take effect immediately, which in practice means that an acquitted person may be detained or subject to bail or restrictive measures up until the appeal.

Article 266: Final Judgment

1. A judgment becomes final once the period for filing an appeal has expired and where none of the parties has filed an appeal.
2. Where an appeal has been filed by either of the parties under Chapter 12, the judgment becomes final when the appeals court issues a new judgment affirming, reversing, or amending the judgment of the trial court under Article 284.

Commentary

Paragraph 1: The question of when a judgment becomes final is relevant to the issue of double jeopardy, or *ne bis in idem*, which is contained in Article 9 of the MCC. Reference should be made to Article 9 and its accompanying commentary for further discussion. Reference should also be made to Article 277, which sets out the relevant time limits for filing an appeal.

Paragraph 2: Where either party files an appeal, the judgment of the trial court will not become final until the end of the appeal, when the appeals court, having deliberated on the substance of the appeal, makes a decision on the validity of the trial court judgment. The appeals court under the MCCP has the power to affirm, reverse, or amend the judgment of the trial court upon appeal. Reference should be made to Article 284.

Part 7: Imposition of Penalties and Orders

Article 267: Hearing and Determination of an Appropriate Penalty or Order

1. At the time and date set under Article 264(6), the trial court must conduct a hearing to determine the appropriate penalty or orders to be imposed on the convicted person.
2. The prosecutor and the defense may present additional evidence to the trial court before the penalty or orders are determined.
3. The victim may also make a statement to the trial court at the hearing.
4. Once the trial court has heard the evidence of the prosecutor, the defense, and the victim, it must enter into deliberations to determine the appropriate penalty or order.
5. The applicable procedure set down in Sections 12–14 of the General Part of the MCC must be followed by the trial court in determining the penalties.
6. Where a person is convicted and is required to serve a penalty of imprisonment, any time spent in detention prior to and during the trial must be deducted from total term of imprisonment imposed by the trial court.

Commentary

Under Article 227, after closing arguments by both parties at the trial, the hearing must be declared closed. The purpose of the trial is to determine the criminal responsibility of the accused person. Under Article 263, the judge or panel of judges must then enter into deliberations. At the end of the court's deliberations, the court will then pronounce its verdict. When a person is found "criminally responsible" by the court, the next step is to determine what penalties will be imposed.

Before making a decision, the court must hold a sentencing hearing under Article 267. The rationale for holding a separate sentencing hearing is clear. It would be grossly

unfair to make the accused person present evidence at trial that he or she was not criminally responsible and then to make him or her also present evidence to mitigate his or her criminal responsibility. Evidence of the latter is generally premised on the fact that the applicable penalty should be mitigated for various reasons (such as those set out in Article 51 of the MCC on mitigating and aggravating factors to be taken into account in determining a penalty).

During the sentencing hearing, the prosecution and defense will present evidence before the court. The victim of the criminal offense may also present evidence. The evidence presented is not the same as that presented during the trial, the purpose of which was to prove or disprove the criminal responsibility of the accused person. Instead, the evidence during the sentencing hearing relates to the type of penalties that should be imposed upon the convicted person and the length of the penalties. Much of this evidence may show the presence of aggravating or mitigating factors set out in Article 51 of the MCC. For example, the victim may testify to the violence he or she incurred during the criminal offense (Article 51[2][c] of the MCC), or the prosecution may present evidence that the convicted person cooperated with the court (Article 51[1][h] of the MCC).

Once the court has heard evidence from the convicted person, the prosecutor, and the victim, it must deliberate upon the appropriate principal penalty or alternative penalty and on any additional penalties. It must also determine whether there are grounds to confiscate any proceeds of crime or property under Section 13 of Part I: General Part of the MCC.

Article 268: Pronouncement of the Penalty or Order

1. A date and time must be set by the trial court for the pronouncement of the penalty or order to be imposed upon the convicted person.
2. The prosecutor and defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The penalty or order must be pronounced in public and in the presence of the convicted person, subject to Article 62(2).

Commentary

Article 62 protects the right of the accused person to be present at the pronouncement of his or her sentence. Article 268 upholds this right. The only exception to the presence of the accused at the pronouncement of the judgment is contained in Article 62(2).

Article 269: Preparation and Release of a Written Judgment

1. A written and reasoned judgment must be prepared by the trial court after the trial and the hearing to determine the appropriate penalty or order to be imposed upon the convicted person.
2. The written judgment must contain, at a minimum, the following elements:
 - (a) the name of the accused person who was on trial;
 - (b) the name of the trial court, the judge or judges who heard the case, the prosecutor, and the defense;
 - (c) the date of the judgment;
 - (d) the criminal offense, or offenses, for which the accused is on trial;
 - (e) an account of the factual circumstances on which the case rests;
 - (f) an account of the facts that the trial court considers have been proven and those that have not been proven;
 - (g) legal findings based on the facts proven and the reasons for the legal findings;
 - (h) a finding in relation to the criminal responsibility of the accused in relation to each count in the indictment;
 - (i) the relevant penalty and order to be imposed upon the convicted person, if any;
 - (j) in the case of imprisonment, any time spent in detention prior to and during the trial;
 - (k) the duration of the penalty or order, including any deduction from the term of imprisonment for time spent in detention prior to and during the trial;
 - (l) in the case of a fine or a payment of compensation to a victim, the amount and the date upon which the payment must be made and the fact that the payment should be made through the registry of the trial court;
 - (m) the person or body responsible for executing or supervising the penalty or order;
 - (n) where the person is found not criminally responsible, and where a warrant for the temporary seizure of the proceeds of crime, property, equipment, or other instrumentalities used in, or destined for use in, crime was

made against the person, the judgment must contain an order that all the property be returned to the owner or possessor, where it has been taken into custody or control. Where the warrant for the temporary seizure prohibited the transfer, destruction, conversion, disposition, or movement of property, the judgment must contain an order that all restrictions on dealing with the property be lifted; and

- (o) the signature of the judge or panel of judges.
- 3. The trial court may release the written judgment when the penalty or orders are pronounced under Article 268.
- 4. The written judgment must be released within a maximum of thirty working days from the date of the pronouncement of the penalty under Article 268.
- 5. The prosecutor, the accused, and his or her counsel must be served with a copy of the written judgment in accordance with Article 27.
- 6. The judgment must be entered into the court file.

Article 270: Appeal of Errors and Miscalculations in a Written Judgment

- 1. The prosecutor and the defense may, within ten working days of the date of service of a written judgment, file a motion with the trial court claiming miscalculations or typographical errors in the judgment.
- 2. Where the trial court finds that there has been such an error, it must order immediate correction of the judgment.

Part 8: Execution of Penalties and Orders

Article 271: Execution of Penalties and Orders

1. Any penalty or order of the trial court must be executed immediately upon the pronouncement under Article 268.
2. Where the penalty imposed upon the convicted person is a term of imprisonment, the convicted person must be imprisoned immediately. The trial court must remand the convicted person to the custody of the detention authority for transfer to the detention center.
3. A written order for imprisonment must be made by the trial court, if the written judgment has not yet been released. Upon the completion of the written judgment, it must be given to the detention authority.
4. If a penalty of imprisonment is imposed upon the convicted person, the person must be released immediately if the time spent in detention prior to the hearing exceeds the applicable penalty of imprisonment.
5. Where the penalty imposed upon the convicted person is a fine or a payment of compensation to a victim, the fine or compensation must be paid to the trial court through the registry at a date to be pronounced by the court in the written judgment.
6. The court may issue an order for a stay of execution of a penalty or order if the defense indicates that it intends to file an appeal under Article 274. A stay of execution is effective until the end of the appeal or until the appeal is discontinued, whichever comes first.

Commentary

Article 271 provides some general guidance on the execution of penalties at the end of a trial. In many states, specific legislation is dedicated to regulating the execution of penalties; a post-conflict state may wish to consider drafting and implementing such legislation.

The general principle espoused in Article 271 is that penalties should be executed, or in other words put into effect (e.g., a person must begin to serve a penalty of impris-

onment), immediately upon their pronouncement under Article 268 (which may not coincide with the release of the written judgment). If under Article 268 the court imposes a penalty of imprisonment, the convicted person must be imprisoned immediately (unless the person has already served the full term of imprisonment during pretrial detention). Article 271 provides that the detention authority be provided with the judgment or, if the judgment is not available, with a written order for imprisonment. This clause is important so that the detention authority can put the order in the convicted person's file and make sure that he or she is released at the appropriate date in the future. In many post-conflict states, the keeping of records has been deemed to be substandard; this flaw has resulted in persons being imprisoned well beyond the term of imprisonment imposed by a court. For this reason, in Article 271 and elsewhere throughout the M CCP, there is a strong emphasis on ensuring that written records be properly maintained.

With regard to fines, under Article 269(2)(1), the judgment of the court should set out both the amount of the fine and the date upon which it should be paid. Details regarding the payment of fines are set out in Articles 50 and 60 of the MCC. Article 50 deals with the payment of a fine as a principal penalty, whereas Article 60 deals with the payment of a fine as an additional penalty. Where a person defaults on the payment of a fine as a principal penalty, Article 50(6) provides that the person in default may receive a term of imprisonment not exceeding three months or an alternative penalty may be imposed upon him or her. Under Article 60(5), where a person defaults on a fine that was an additional penalty, the person may be brought before the court to explain his or her nonpayment and a penalty of imprisonment not exceeding three months may be imposed.

Where either the prosecution or the defense indicates to the court that it intends to file an appeal under Article 274, the court has the discretion to stay, or temporarily suspend, the execution of the order. This means that if the accused person was not in pretrial detention pending trial, the person would remain free until the appeal ended or was discontinued. If the appeals court finds that the verdict and the penalty of the trial court were correct, the sentence of imprisonment will commence at the end of the appeal. The court may, however, refuse to stay the execution of the penalty, in which case a person who is sentenced to imprisonment must be taken into custody by the detention authority.

Part 9: Supervision of Imprisonment and Conditional Release

Article 272: Supervision of Imprisonment

1. All matters relating to the supervision and execution of a penalty of imprisonment, except conditional release after trial set out in Article 273, must be decided by the trial court that pronounced the penalty.
2. In the event that the judge or panel of judges of the competent trial court are no longer available or otherwise unable to exercise their functions, the judge administrator of the trial court must designate another judge or judges to supervise the imprisonment of the convicted person.
3. The convicted person may file complaints or requests relating to the execution of the penalty of imprisonment, in writing, with the competent judge or panel of judges responsible for supervising his or her imprisonment.

Article 273: Conditional Release after Trial

1. After the convicted person has served two-thirds of his or her penalty of imprisonment, the convicted person may make a motion to the president of the courts to convene a conditional release panel.
2. When the president receives a request for the convening of a conditional release panel, the president must convene a panel consisting of three judges.
3. The purpose of the conditional release panel is to determine whether the convicted person may be released from imprisonment before the expiration of the term of imprisonment imposed upon him or her.
4. The conditional release panel must set a time and date for a hearing to determine whether the convicted person may be released from imprisonment.

5. Notice of the hearing must be served upon the convicted person and the prosecutor in the case in accordance with Article 27. Notice must also be served upon the victim in accordance with Article 75(1).
6. The convicted person, the prosecutor in the case, and the victim may be heard during the course of the hearing.
7. Conditional release may be granted only where:
 - (a) two-thirds of the term of imprisonment has been completed;
 - (b) a favorable report on the conduct of the convicted person has been presented to the conditional release panel by the detention authority; and
 - (c) credible evidence has been presented that the convicted person poses no danger to public security or safety.
8. An order for conditional release may include any measure that promotes the peaceful reintegration of the convicted person into society, including one or more of the following:
 - (a) a prohibition on the convicted person from appearing in specified places;
 - (b) a prohibition on the convicted person from associating with persons identified in the order;
 - (c) a prohibition on the convicted person from leaving the jurisdiction of the trial court without previous authorization from the conditional release panel and the confiscation of the convicted person's passport; or
 - (d) a requirement that the convicted person appear regularly before the conditional release panel or another appointed body or person for a certain period of time.
9. Conditional release must be terminated if the convicted person commits a subsequent criminal offense or violates any of the conditions established in the order for conditional release. Upon termination of conditional release, the convicted person must immediately continue his or her original term of imprisonment until its completion.
10. A motion may be filed with the president of the courts to convene a conditional release panel where a doctor determines that the convicted person is terminally ill.
11. The conditional release panel must set a time and date for a hearing, and notice of the hearing must be served in accordance with Paragraph 5.
12. The conditional release panel may order that the convicted person who is terminally ill be conditionally released on humanitarian grounds.

13. The conditional release terminates on the day on which the convicted person would have been eligible for unconditional release if the entire term of imprisonment had been completed.

Commentary

Most states have established a system of *conditional release* or *parole* that allows a convicted person, in certain circumstances, to be released prior to fully completing his or her penalty of imprisonment. Article 273 provides a mechanism for the establishment of a conditional release panel to determine this issue. A *conditional release panel* is known as a parole board or a probation board in some states. In some legal systems, a parole board is composed of appointed individuals who may not be judges. Under the MCC, the conditional release panel is convened by the president of the courts and is composed of three judges.

A person may also file a motion with the president of the court for conditional release where he or she is terminally ill. The conditional release board may release the convicted person on humanitarian grounds where a doctor finds that the person is terminally ill.

Most states with a system for conditional release or parole have implemented laws on the establishment of a parole or probation service to supervise the conditional release of a convicted person. Convicted persons may be required to report to the parole service at set intervals as set out in Paragraph 8(d). The parole/probation service may also play a role in supervising convicted persons who are serving an alternative penalty of semiliberty or community service or a suspended sentence. A post-conflict state implementing provisions on conditional release should consider establishing a probation/parole service.

Chapter 12: Appeals and Extraordinary Legal Remedy

General Commentary

Chapter 12 deals with both appeals and an extraordinary legal remedy. For a discussion of appeals, reference should be made to the general commentary to Chapter 12, Part 1. For a discussion of extraordinary legal remedy, reference should be made to the general commentary to Chapter 12, Part 2.

Part 1: Appeals against Acquittal or Conviction or against a Penalty

General Commentary

The right to an appeal is recognized as a human right and is almost universally implemented in a domestic context. The right to an appeal is recognized in Article 14(5) of the International Covenant on Civil and Political Rights, Article 8(2)(h) of the American Convention on Human Rights, Article 7(1)(a) of the African Charter on Human and Peoples' Rights, and Article 2 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to an appeal, according to the United Nations Human Rights Committee, "provides that everyone convicted of a crime shall have the right to have his conviction and sentence be reviewed by a higher tribunal according to law" (General Comment no. 13, paragraph 17). In addition, the right to a fair and public hearing must be observed throughout the appeals proceedings (General Comment no. 13, paragraph 17).

The way in which the right to appeal is implemented varies greatly from state to state. In some states, only a convicted person may make an appeal. The preclusion of a prosecutorial appeal is justified by some on the basis that a prosecutorial appeal violates the principle of *ne bis in idem*, or double jeopardy. Many other experts, however, believe that a prosecutorial appeal is not a violation of the double jeopardy principle because the appeal is the continuation of the same proceedings rather than a new proceeding (in which case, the principle of double jeopardy may preclude the redetermination of the criminal responsibility of the person). Conversely, in many states, a prosecutorial appeal is permissible. In some states that allow a prosecutorial appeal, the prosecutor may appeal only to the detriment of an accused or convicted person (e.g., to appeal against a finding of "not criminally responsible" by the lower court or to appeal

the leniency of a sentence). However, in other legal systems, the prosecutor may appeal either to the detriment or to the benefit of the accused or convicted person.

It is not only who may appeal that varies between states but also (a) what may be appealed, (b) how the appeal may be filed and heard, and (c) what powers the appeals court has to amend or revise the verdict or sentence of the lower court. Some jurisdictions allow appeals both before and during the trial—called *interlocutory appeals*—under which judicial determinations may be appealed to a higher court. The issues that can be appealed by way of interlocutory appeal vary immensely from state to state. With regard to appeals that occur at the conclusion of the trial, in most legal systems, an appeal can be made on the basis of alleged errors of law and errors of fact made by the trial court in rendering its verdict. Whether the sentence or penalty handed down by the lower court can be appealed differs from state to state. Some states allow the sentence to be appealed and, as will be discussed later, allow the appeals court to revise the sentence. Another sort of appeal that is permissible in some legal systems is an appeal on the basis of a procedural irregularity. The laws of a particular state may permit any variation of these forms of appeal.

As for the question of how the appeal is filed and heard, in some jurisdictions, the appellant requires the permission of the lower court to make an appeal. This is known as *leave to appeal*, and the potential appellant will not be able to have his or her appeal heard unless leave to appeal is granted. In other jurisdictions, there is no requirement to obtain leave to appeal and the appeal can be made directly to the appellate court. Once the appeal is before the appellate court, the court is responsible for determining the substance of the appeal. How the appeal is determined will depend on the nature of the appeal and sometimes which court the appeal derives from. In some states where interlocutory appeals are permissible, the appeal may be done on the basis of a *paper review*, meaning a review of the issues based on the case file and relevant materials only. This is not universal practice, however, and many states require that interlocutory appeals be heard in oral proceedings before the appeals court. Other forms of appeal aside from interlocutory appeal are commonly heard in oral proceedings with the parties present. Some legal systems provide for a trial *de novo*, which means that the appeals court assesses all the evidence assessed by the lower court. In other legal systems, the appeals court will review only the relevant points of law or fact or issues relating to the sentence that are in dispute. Once the court has heard the appeal, the next question that arises is what are the powers of the appeals court? Can it amend or revise the judgment of the lower court? Or does it simply have the power of *cassation*, which means to either set aside or confirm the judgment of the lower court? Practice regarding the powers of the appeals court varies significantly from state to state.

Because of the immense diversity in the law and practice surrounding appeals, the drafters of the MCCP had a wide range of options to choose from. In drafting the appeals section of the MCCP, the drafters carried out extensive research to determine the options available, which were then discussed at great length. The range of options provided for in the MCCP are quite broad and are significantly influenced by both state practice and the law and practice of the international tribunals (the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda) and the International Criminal Court.

In summary, the MCCP provides that both the prosecutor and the convicted person may make an appeal on a number of different grounds both pretrial and post trial. Pretrial and during trial, the prosecutor or the suspect or the accused may make an interlocutory appeal under Article 295. Once the trial has been completed and the verdict and penalties have been rendered, the prosecutor and the convicted person may appeal on the following grounds: (a) on an error of law or error of fact, and (b) on a penalty imposed by the lower court. With regard to interlocutory appeals, the appeal is a paper appeal only, with the judges determining the appeal without an oral hearing. All the other appeals are conducted by way of oral proceedings with all parties present. Under the MCCP, the appeals court may hear new evidence but must not conduct a trial *de novo*, or from the beginning (and therefore hear all the evidence once again). The appeals court, upon hearing an appeal (other than an interlocutory appeal), has the power to confirm, overrule (and thus reverse), or modify the judgment of the trial court. The appeals court is also empowered to require that a new trial be conducted by a newly constituted trial court.

It is important to note that the existence of a written judgment of the trial court, as required under Article 269, and transcripts or records of the trial, as required under Article 37 and Article 217, are vital to the appeals process.

Reference should be made to Chapter 2, Part 3 on the constitution and powers of the appeals court.

Article 274: Grounds of Appeal

1. The prosecutor, the convicted person, or the prosecutor on behalf of the convicted person may appeal the decision of the trial court on grounds of:
 - (a) an error of fact; or
 - (b) an error of law; or
 - (c) the penalty or order imposed by the trial court.
2. Where the competent panel of the appeals court, in considering an appeal under Paragraph 1(a) or 1(b), considers that grounds exist to reduce the penalty or order under Paragraph 1(c), the court may invite the prosecutor or the convicted person to submit grounds under Paragraph 1(c).
3. Where the competent panel of the appeals court, in considering an appeal under Paragraph 1(c), considers that grounds exist upon which the conviction may be set aside, wholly or in part under Paragraph 1(a) or 1(b), it may invite the prosecutor and the convicted person to submit grounds under Paragraph 1(a) or 1(b).

Commentary

As discussed in the general commentary to Chapter 12, under the M CCP, both the prosecutor and the convicted person may appeal on the basis of an error of fact or law without leave to appeal and also appeal on the basis of the penalty or order imposed upon the convicted person. The meaning of error of law is dealt with in greater detail in Article 275 and Article 276 (which deals with an error of law as it relates to an error of the criminal procedure law rather than substantive criminal law).

Article 275: Error of Law

1. An appeal on an error of law may refer to violations of both substantive and procedural law.
2. An error of substantive law exists where the provisions of the MCC have been wrongly applied, including a violation of the determination of penalties under Section 12 of the General Part of the MCC.
3. An error of procedural law exists when a substantial violation of the M CCP exists, as provided for in Article 276.

Article 276: Substantial Violation of the M CCP

1. A substantial violation of the M CCP exists where:
 - (a) the trial court was not properly constituted in the manner required in Article 6 or an appeals court is not properly constituted in the manner required in Article 12;
 - (b) the trial court did not have jurisdiction under Articles 4, 5, or 6 of the MCC to hear the case;
 - (c) a judge who should have been disqualified under Article 19 participated in the proceedings;
 - (d) a judge, whose presence was required at trial under Article 215, was not present at all sessions;

- (e) a hearing or trial was conducted otherwise than in public, in violation of Article 62;
 - (f) a suspect or accused had no legal assistance or interpreter as required by Articles 59, 67, and 68;
 - (g) a party that was obliged to be present during a hearing or at trial was excluded from the proceedings in violation of the M CCP;
 - (h) the judgment was based on evidence that should have been excluded in accordance with Article 230;
 - (i) the court based its judgment, in violation of Article 263(7), solely, or in the absence of corroborating evidence, to a decisive extent upon the evidence of a sole anonymous witness, a sole cooperative witness, a child who testified without making a solemn declaration, or a statement or confession given to the police or the prosecutor;
 - (j) the judgment of the trial court was not reasoned as required by Article 269; or
 - (k) the judgment of the trial court determined matters beyond the scope of the indictment.
2. A violation of the procedural law also exists where, in the course of the criminal proceedings, the court, the prosecutor, or the police:
- (a) omitted to apply a provision of the M CCP or applied it incorrectly; or
 - (b) violated the rights of the suspect or the accused and this violation influenced, or might have influenced, the rendering of a lawful or proper judgment.

Commentary

A substantial violation of the M CCP is an error of law under Article 275. Two types of substantial violations are provided for in the M CCP. The first, contained in Paragraph 1, is a substantial violation on the basis of absolute grounds. This means that in any case where the appeals court finds the grounds set out in Paragraph 1(a)–(k) exist, the court must find a substantial violation has occurred without further inquiry. The second type of substantial violation, contained in Paragraph 2, is a violation on the basis of relative grounds. No particular violations of the M CCP are laid out, which means that an applicant could claim a violation of any aspect of it. However, in order to find a substantial violation under Paragraph 2, the particular violation of the M CCP alleged must have affected the legality of the judgment; a relationship must exist between the violation and the judgment, in that the violation may have influenced the rendering of a lawful and proper judgment. The type of appeal under Article 276 is not found in all states, and thus may not be familiar to some. Another element that might be equally

unfamiliar is the obligation of the appeals court to look into a substantial violation of the MCCC, even if neither of the parties has raised this issue (see Article 282), and the obligation to order a full retrial where a substantial violation is found. The drafters of the MCCC were of the view that such an obligation is an important measure to protect the rights of the accused person and to protect the integrity and fairness of the proceedings. The grounds chosen under Paragraph 1, a breach of which automatically leads to a finding of a substantial violation, were arrived at after comparative research on legislation on this sort of appeal in many countries and research on what grounds were typically found in this legislation. All the grounds chosen, in the view of the drafters of the MCCC, represent major violations of the MCCC such that their existence significantly jeopardizes the integrity and fairness of the proceedings or the rights of the accused. For all other violations of the MCCC, according to Paragraph 2, the court must assess whether the violation negatively impacted, or may have negatively impacted, the judgment.

Paragraph 1(b): Where the court does not have jurisdiction to hear the case, either because it lacks territorial, extraterritorial, or universal jurisdiction over the criminal offense or because it lacks personal jurisdiction over the suspect or the accused, the case cannot proceed. Where the appeals court finds that the trial court had no jurisdiction to proceed in the case, the appeals court must dismiss the case. Unlike in other instances of substantial violations of the MCCC, no retrial can take place because the court does not have jurisdiction to hear the case.

Article 277: Procedure upon Filing an Appeal Statement

1. The prosecutor or the defense must make an appeal no later than thirty working days from the receipt of the written judgment of the trial court.
2. Where the prosecutor and the defense have been invited to submit an appeal pursuant to Article 274(2) or 274(3), the relevant party must make an appeal no later than thirty working days after the competent panel of the appeals court has invited it to submit an appeal.
3. In order to file an appeal, the prosecutor or the defense must file a written appeal statement with the registry of the competent trial court.
4. The appeal statement must include the following:
 - (a) the name of the prosecutor and the defense;
 - (b) the name of the competent trial court that issued the appealed judgment;
 - (c) the specific grounds of the appeal;

- (d) a summary of the case;
 - (e) the evidence sought to be presented at the hearing of the appeal, if any; and
 - (f) the remedy sought.
5. A copy of the appealed judgment must also be filed with the registry of the competent appeals court at the same time the appeal statement is filed.
 6. Where an appeal is filed by a convicted person acting without the assistance of counsel, the appeal statement must not be rejected solely on the basis that it does not comply with the requirements of Paragraph 4.
 7. Where no written appeal statement is filed by the prosecutor or the defense within thirty days of receipt of the written judgment of the trial court, both parties are deemed to have waived their right to appeal and the judgment of the trial court is final. Where a stay of execution of the applicable penalties or orders has been ordered under Article 271, the stay of execution must be cancelled and the applicable penalties and orders must be executed immediately.

Commentary

Paragraph 6: The drafters of the MCC included this provision to ensure that an appeal made by the defense will not be automatically rejected by the court on the basis that it does not fully comply with the procedural and technical requirements of Article 277. Where the defense has submitted an appeal without the assistance of counsel (which may be the case in a post-conflict state experiencing a shortage of lawyers), the court must accept correspondence from the defense that, while not presented in the form of an appeal statement, nonetheless resembles it in substance.

Article 278: Notification of the Respondent of an Appeal, Response to the Appeal Statement, and Cross-Appeal

1. After a written appeal statement is filed with the registry of the competent trial court by the appellant, the registry must notify the respondent of the appeal in accordance with Article 27. A copy of the appeal statement must also be delivered to the respondent.

2. The respondent has thirty working days from receipt of the notification of the appeal statement to file a response to the appeal with the registry of the trial court.
3. The response to the appeal statement may include a cross-appeal and must be filed with the registry of the competent trial court.
4. The cross-appeal, if any, must include the information set out in Article 277(4).
5. If the response includes a cross-appeal, the registry must notify the appellant about the cross-appeal in accordance with Article 27. A copy of the cross-appeal must also be delivered to the appellant.
6. The appellant has fifteen working days to file a response to the cross-appeal.

Commentary

The *appellant* is the party that files the appeal statement with the registry of the appeals court; the *respondent* is the other party in the proceedings. If the defense appeals the judgment of the trial court, the prosecutor is the respondent, and vice versa. A *cross-appeal* is the name given to an appeal made by the respondent.

Article 279: Transmission of the Trial Records to the Appeals Court and the Parties

1. After receipt of the response to the appeal and cross-appeal, if any, or after the periods allowed for such responses have expired, the registry of the trial court must forward the records of the trial and the case file to the registry of the appeals court.
2. The registry must make copies of the records of the trial and distribute the records to the prosecutor and the convicted person.

Commentary

As discussed in the general commentary to this part, it is imperative that both parties have access to the trial records in order to participate in the appeal proceedings.

Article 280: Discontinuation of an Appeal

1. The prosecutor and the defense may at any stage discontinue an appeal by filing a written notice of discontinuation of the appeal.
2. The prosecutor may withdraw an appeal statement by presenting a written statement of discontinuation of the appeal to the appeals court.
3. The defense must not discontinue an appeal without the written consent of the convicted person. In cases where a convicted person was tried jointly with another accused under Article 193, the discontinuation of the appeal of one appellant does not affect other appellants.
4. The registrar must notify the other party of the discontinuation of the appeal in accordance with Article 27.

Article 281: Competence Regarding Detention of the Convicted Person

Upon receipt of the case file and records of the trial from the trial court, the competent panel of the appeals court is responsible for all matters concerning the detention of the convicted person until the judgment on appeal is pronounced.

Article 282: Appeal Hearing

1. Upon receipt of the court file and trial record, the competent panel of the appeals court must set a date and time for a hearing of the appeal.
2. The registry must notify the prosecutor and the defense of the date and time of the hearing in accordance with Article 27.
3. During any appeal hearing, the court must, of its own motion, inquire into whether there were any substantial violations of the MCCP during the trial in accordance with Article 276(1).

4. If there is no complaint by either side in relation to evidence presented during the trial, the appeal may proceed on the record of evidence produced before the trial court.
5. The prosecutor or the defense may file a motion to introduce new evidence during the hearing of the appeal.
6. The appeals court must permit the introduction of the new evidence, if the evidence was not known to the party seeking to introduce it at the time of the trial and could not have been discovered through the exercise of due diligence.
7. The rules of procedure and evidence that govern proceedings of the trial court apply, with the necessary modifications, to a hearing of an appeal in the appeals court.
8. If witness testimony is allowed by the appeals court, witnesses offered by the appellant must be examined first, followed by the examination of witnesses offered by the respondent.
9. Witnesses must be questioned first by the party calling the witness, followed by the other party, and then by the appeals court.
10. The hearing of an appeal must be recorded in accordance with Article 37.

Commentary

The MCCP requires that an appeal on the basis of a conviction, acquittal, or a penalty or order requires an oral hearing held in public. This is in keeping with the requirement that an appeal respect the right to a public hearing, as discussed in the general commentary to Chapter 12, Part 1. The purpose of the oral hearing of the appeal is not to revisit all the issues that were discussed at trial but rather to adjudicate the issues of contention arising out of the grounds listed in Article 274. Unlike in some legal systems, the appeals court is not conducting a fresh trial, nor may the appeals court, as is the case in some legal systems, enquire into other aspects of the trial court, save with the exception of its consideration of substantial violations of the MCCP under Paragraph 3. On the basis of judicial economy, the drafters decided not to include in the MCCP an appeal that was akin to a full retrial or an appeal in which any matters relating to the trial may be raised by either party or the court.

A novel feature of the oral hearing in the MCCP, which is a feature of some legal systems and of the Rules of Procedure and Evidence for the International Criminal Court, is the permissibility of fresh evidence before the appeals court where the evidence was not known at the time of the trial (and could not have been found with the exercise of due diligence). The appeals court would thus work from the record of the trial and the new evidence (which may include witness testimony) in determining the validity of the appeal.

Article 283: Deliberations of the Competent Panel of the Appeals Court

1. After the hearing of an appeal, the panel of judges must deliberate in private.
2. The judgment must be decided on the basis of the appeal file. The appeal file consists of the record of the trial and the record of the appeal.
3. The judgment of the competent panel of the appeals court must be rendered by a majority vote.
4. The competent panel of the appeals court may, in its judgment, confirm, reverse, or amend the judgment of the trial court.
5. Where the appeals court finds that there was an error of law or fact as set out in Articles 274–276, it may:
 - (a) reverse or amend the judgment, including the penalty or order; or
 - (b) order a new trial before a different judge or panel of judges of the competent trial court.
6. Where the appeals court finds that a substantial violation exists, the court must order a retrial under Paragraph 5(b), except in the case of a substantial violation under Article 276(b).
7. Where an appeal in favor of the convicted person has been filed, the judgment may not be modified to the detriment of the accused.
8. If the competent panel of the appeals court, in an appeal against a penalty or order under Article 274(1)(c), finds that the penalty or order is disproportionate to the seriousness of the criminal offense, it may vary the penalty or order in accordance with the procedure set out in Sections 12–14 of the General Part of the MCC.
9. If a convicted person is successful in the appeal and the appeals court finds that the reasons for its decision in favor of the accused, excluding reasons of a purely personal nature, are also to the advantage of a co-accused who has not filed an appeal or has not filed an appeal along the same lines, the court must proceed on its own motion as if such appeal were also filed by the co-accused.

Commentary

There are several levels of appeals in some legal systems. A panel of an appeals court may hear an appeal initially. An appeal from a panel may be heard by the appeals court sitting *en banc* (meaning with all its judges). In other systems, an appeal may go to a supreme court or to a constitutional court. Under the MCCP, in light of the simple court structure developed in Chapter 2, there is only one level of appeal. Where a post-conflict state is reforming the provisions of the applicable law on appeals, the state must consider the court system in place and may consider providing for other levels of appeal beyond the sort of one-tiered panel hearing provided for in the MCCP.

Once the appeals court has held a hearing under Article 282, it must begin its private deliberations on the substance of the appeal. A number of options are available to the appeals court depending on the type of appeal lodged. If the appeal relates to an error of law or fact, the appeals court may confirm the judgment (and therefore the original judgment stands and must be executed under Article 271), reverse the judgment, amend the judgment, or refer the case back to a newly composed trial court for retrial. Where the appeal relates to the severity of any penalty or order imposed by the trial court, the court may simply confirm the penalty or order; in this case, the penalty or order must be executed immediately. Where the appeals court finds that the penalty or order imposed was disproportionate to the seriousness of the criminal offense, it must modify the original trial court judgment by changing the penalty or order.

Paragraph 6: Because a substantial violation of the MCCP affects the legality and integrity of a judgment, Paragraph 6 provides that the judgment is automatically nullified and that a retrial must be ordered. Where the substantial violation is based on a lack of jurisdiction, no retrial can be ordered because the trial court did not have jurisdiction over the accused in the first place. Reference should be made to the commentary to Article 276(1)(b) for further discussion.

Paragraph 7: Where the appeal is filed by the convicted person and where the appeal is not successful, Paragraph 7 requires that the court not augment the penalty or order imposed by the trial court so as to make it more severe, nor alter the legal qualification of the criminal offense to the detriment of the convicted person. The latter restriction means that, for example, a conviction for theft (which is the “lesser-included offense” of robbery) may not subsequently be altered by the appeals court to become a conviction for robbery. This principle—which is known as the principle of “prohibition of *reformatio in peius*”—is standard in many states around the world.

Paragraph 9: Paragraph 9 concerns a scenario where there were two or more co-accused in a particular case. When one of the co-accused files an appeal and wins the appeal, another co-accused who has not filed an appeal (or does not file an appeal on the same grounds) may benefit from the appeal filed by his or her co-accused. The principle is known as *beneficium cohesionis* in many states, and it requires that the court act as if the co-accused who has not filed an appeal (or who has filed on different grounds to his or her co-accused) actually filed the appeal. The only exception to this rule is where the co-accused who filed the appeal was successful on grounds personal to him or her that do not apply to a co-accused person.

Article 284: Pronouncement of the Judgment on Appeal

1. The judge or panel of judges must set a date and time for the pronouncement of the judgment of the appeal.
2. The prosecutor and defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The judgment must be pronounced in public, except where the interests of a juvenile require otherwise, as provided for in Article 62(3).
4. The judgment must be pronounced in the presence of the convicted person, subject to Article 214.
5. The presiding judge must declare whether the competent panel of the appeals court will confirm, overrule, or modify the judgment of the trial court.
6. Where the judgment of the trial court is confirmed, the presiding judge must order that the penalties and orders of the trial court be executed immediately.
7. Where the judgment is reversed or modified, the presiding judge must declare whether it orders that:
 - (a) the original judgment, penalty, or order is reversed or modified; or
 - (b) a newly constituted panel of the competent trial court must hear the case from the beginning.
8. Where the judgment, penalty, or order of the trial court is reversed or modified, the presiding judge of the competent panel of the appeals court must declare how the judgment, penalty, or order of the trial court will be altered or amended.
9. Where a judgment is confirmed or modified and where the convicted person is required to serve a penalty of imprisonment, any time spent in detention before the trial and between the end of the trial and the pronouncement of the judgment on appeal must be deducted from the total term of imprisonment.
10. Where a penalty or order is pronounced by the appeals court, the penalty or order must be executed immediately.

Commentary

Reference should be made to Article 62 on public trials, regarding the exclusion of the public from the delivery of the judgment, and to Article 215, regarding the exclusion of the convicted person from the delivery of the judgment.

Article 285: Preparation and Release of a Written Appeal Judgment

1. A written and reasoned judgment must be prepared by the competent panel of the appeals court.
2. The written judgment must contain, at a minimum, the following elements:
 - (a) the name of the appellant and the respondent in the case;
 - (b) the name of the appeals court, the judges on the competent panel of the appeals court, the prosecutor, and the defense;
 - (c) the date of the judgment;
 - (d) a decision on each of the grounds of appeal raised by the appellant;
 - (e) a decision on each of the grounds raised by the respondent in cross-appeal;
 - (f) an order to confirm, reverse, or modify the original judgment, penalty, or order of the competent trial court;
 - (g) in the case of a confirmation of the original judgment, penalty, or order, an order that the original penalty or order must be executed immediately;
 - (h) in the case of a reversal or modification of the original judgment, penalty, or order, an order on how the judgment, penalty, or order must be amended or altered or an order that the case must be heard by a newly constituted panel of the competent trial court; and
 - (i) the signature of the judge, or of all the judges of a panel of judges.
3. Separate or dissenting opinions may be appended to the main judgment.
4. The competent panel of the appeals court may release its written judgment at the time the judgment is pronounced under Article 284.
5. The written judgment must be released within a maximum of thirty working days from the date on which the judgment of the competent panel of the appeals court was pronounced under Article 284.

6. The prosecutor and the defense must be served with a copy of the written judgment in accordance with Article 27.
7. The judgment must be entered into the appeal file.

Commentary

Paragraph 3: In contrast to the judgment of the trial court, separate or dissenting opinions may be drafted by individual judges and published with the main appeals court judgment.

Part 2: Extraordinary Legal Remedy to Reopen Criminal Proceedings Terminated by a Final Judgment

General Commentary

An extraordinary legal remedy differs from an appeal. The difference relates to whether or not the judgment that the appeals court is reviewing is final or not. An appeal under Chapter 12, Part 1 involves the appeals court examining a judgment that is not yet final (under Article 266 the judgment of the trial court is not final until after the time limit for both parties filing an appeal has passed and neither have filed an appeal). An extraordinary legal remedy, on the other hand, involves the reopening of final proceedings, whether those proceedings became final after trial (where no appeal was filed by the parties) or after appeal. As is apparent from the name of this remedy—an extraordinary legal remedy—this sort of reopening of a final judgment occurs only rarely. Even more rare is the reopening of the final judgment by a person other than the accused (as provided for in Article 288[2][c]).

Article 286: General Provision on Reopening of Criminal Proceedings

1. Criminal proceedings terminated by a final judgment may be reopened only through the extraordinary legal remedy set out in Part 2.
2. An application for reopening of criminal proceedings must not stay the execution of a final judgment. The appeals court may, however, in determination of an extraordinary legal remedy and pending its final decision, order an interruption of the execution of a final judgment.
3. Criminal proceedings terminated by a final judgment may be reopened to the detriment of the accused person, where:
 - (a) it is discovered that decisive evidence, taken into account at trial and upon which the judgment or penalty was based, was false, forged, or falsified; and
 - (b) the false, forged, or falsified evidence was the result of a criminal offense committed by the accused person or his or her agent against a witness, an expert witness, an interpreter, a prosecutor, a police officer involved in the investigation, a judge, or someone close to such persons.

4. Criminal proceedings terminated by a final judgment may be reopened to the detriment of the accused person within five years of the time the final judgment was rendered.

Commentary

Paragraph 3: The general rule under the MCCC is that an extraordinary legal remedy to reopen proceedings should be allowed only to benefit the accused person. This prohibition is based on the principle of “prohibition of *reformatio in peius*” discussed in the commentary to Article 283(7). The accused person or the accused person’s representative (e.g., if the accused is deceased) will normally bring such proceedings, although the prosecutor could also petition the court to reopen the proceedings in general if he or she were acting for the benefit of the accused person. The only situation where an application may be made to reopen a final judgment to the detriment of the accused is provided for in Paragraph 3.

Article 287: Grounds for Reopening of Criminal Proceedings

1. Criminal proceedings that have been terminated by a final judgment may be reopened on the grounds that:
 - (a) new evidence has been discovered that:
 - (i) was not available at the time of trial, and such unavailability was not wholly or partially attributable to the party making the application; and
 - (ii) is sufficiently important that had it been proved at trial, the trial would have likely resulted in a different outcome; or
 - (b) it has been discovered that decisive evidence, taken into account at trial and upon which the judgment or penalty depends, was false, forged, or falsified; or
 - (c) new facts were discovered that prove that a substantial violation of the MCCC under Article 276(1) exists.
2. An application for the reopening of criminal proceedings may be brought only where the new fact was not known to the party bringing the appeal at the time of the proceedings and that fact could not have been discovered through the exercise of due diligence.

Article 288: Procedure on Filing an Application to Reopen Criminal Proceedings

1. An application to reopen criminal proceedings must be in writing and must be filed with the registry of the competent appeals court.
2. An application to reopen criminal proceedings may be filed:
 - (a) by the prosecutor acting for the benefit of a convicted person or to the detriment of the convicted person under Article 286(3);
 - (b) by a convicted person; or
 - (c) where a convicted person has died, by his or her spouse, children, parents, or any person alive at the time of the convicted person's death who was given express written instructions from the convicted person to bring such a claim.
3. The application to reopen criminal proceedings must set out the grounds on which the reopening of proceedings is sought.
4. The application to reopen criminal proceedings must, as much as possible, be accompanied by supporting materials.

Article 289: Initial Determination of an Application to Reopen Criminal Proceedings

1. A panel of the appeals court must be assigned to make an initial determination of whether the application to reopen criminal proceedings is of merit. The determination must be made on the basis of the written application.
2. The panel of the appeals court considering the application must deliver a written and reasoned decision on whether the application is of merit or not.
3. The panel of the appeals court must reject the application if the majority of the panel considers that the application is unfounded.

4. If the competent panel of the appeals court determines that the application is of merit, it may, as appropriate, order that:
 - (a) the competent judge or panel of judges of the trial court reconvene to determine whether the judgment or penalty must be revised;
 - (b) a new judge or panel of judges of the competent trial court be convened to determine whether the judgment or penalty must be revised; or
 - (c) the competent panel of the appeals court retain jurisdiction over the matter with a view to determining whether the judgment or penalty must be revised.
5. The written determination of the application to reopen criminal proceedings must be served upon the convicted person and the prosecutor in accordance with Article 27.

Commentary

The first stage in dealing with an application to reopen criminal proceedings is for the competent panel of the appeals court to review the application to determine if it raises sufficient issues to merit holding an oral proceeding. The decision on whether the application is of merit must be in writing. If the application is rejected at this initial stage, no further steps need to be taken. If the application is found to be of merit, the written decision on the application must specify the next steps in the appeals process. The appeals court has three options: it can order the reconvening of the original trial court to rule on the application to reopen criminal proceedings; it can convene a different trial court; or it can determine the matter itself. In either case, under Article 290 (relating to the determination of the application by a trial court) and Article 291 (relating to the determination of the application by the appeals court), a hearing must be convened.

Article 290: Determination of an Application to Reopen Criminal Proceedings by a Trial Court

1. A date and time for the hearing on the application to reopen criminal proceedings must be set by the competent panel of judges of the trial court.
2. The registry must notify the prosecutor and the defense of the date and time of the hearing in accordance with Article 27.

3. At the hearing, the competent judge or panel of judges must rule upon the application to reopen criminal proceedings on the basis of the grounds set out in Article 287.
4. The trial court must permit the introduction of the new evidence, if the evidence was not known to the party seeking to introduce it at the time of the trial and the evidence could not have been discovered through the exercise of due diligence.
5. The rules of procedure and evidence that govern the proceedings of the trial court apply, with the necessary modifications, to a hearing of an application to reopen criminal proceedings.
6. If witness testimony is ordered by the trial court, witnesses offered by the applicant must be examined first, followed by the examination of witnesses offered by the respondent.
7. Witnesses must be questioned first by the party calling the witness, followed by the other party, and then by the trial court.
8. The hearing must be recorded in accordance with Article 37.

Article 291: Determination of an Application to Reopen Criminal Proceedings by the Appeals Court

1. Where the competent panel of the appeals court retains jurisdiction over the application to reopen criminal proceedings, it must set a date and time for a hearing.
2. The registry must notify the prosecutor and the defense of the date and time of the hearing in accordance with Article 27.
3. At the hearing, the panel of judges must rule upon the application to reopen criminal proceedings on the basis of the grounds set out in Article 287.
4. The rules governing the hearing before the competent panel of the appeals court are the same as those governing the hearing before the trial court as specified in Article 290(3)–(8).

Article 292: Deliberations of the Competent Panel of the Appeals Court or the Trial Court

1. After the hearing of the application under Article 290 or Article 291, the panel of judges must deliberate in private.
2. The judgment of the competent panel of the appeals court or the trial court must be rendered by a majority vote.
3. The competent panel of the trial court or the appeals court may, in its judgment, confirm, reverse, or amend the judgment of the trial court.
4. Where the application is submitted by the convicted person, the judgment may not be modified to the detriment of the convicted person.

Article 293: Pronouncement of the Judgment

1. The competent panel of judges of the trial court or the appeals court must set a date and time for the pronouncement of the judgment.
2. The prosecutor and the defense must be notified of the date and time of the hearing in accordance with Article 27.
3. The judgment must be pronounced in public, except where the interests of a child require otherwise as provided for in Article 62(3).
4. The judgment must be pronounced in the presence of the convicted person, subject to Article 214.
5. The presiding judge must declare whether the competent panel of the appeals court will confirm, overrule, or modify the judgment of the trial court.
6. Where the judgment is reversed or modified, the presiding judge must declare how the original judgment or penalty will be reversed or modified.
7. Where the judgment or penalty of the trial court is reversed or modified, the presiding judge of the competent panel of the trial court or appeals court must declare how the judgment or penalty of the original trial court will be altered or amended.

Commentary

Reference should be made to Article 62 on public trials, regarding the exclusion of the public from the delivery of the judgment, and to Article 214, regarding the exclusion of the convicted person from the delivery of the judgment.

Article 294: Preparation and Release of a Written Judgment

1. A written and reasoned judgment must be prepared by the competent panel of the trial court or appeals court.
2. The written judgment must contain, at a minimum, the following elements:
 - (a) the name of the applicant in the case;
 - (b) the name of the appeals court or the trial court, the judges on the competent panel of the appeals court or the trial court, the prosecutor, and the defense;
 - (c) the date of the judgment;
 - (d) a decision on the issues raised by the applicant in his or her application to reopen the proceedings;
 - (e) an order to confirm, reverse, or modify the original judgment or penalty of the competent trial court;
 - (f) in the case of a confirmation of the original judgment or penalty, an order that the original penalty be executed immediately;
 - (g) in the case of a reversal or modification of the original judgment or penalty, an order on how the judgment or penalty must be amended or altered; and
 - (h) the signature of the members of the panel of judges of the trial court or the appeals court.
3. Separate or dissenting opinions or the application to reopen the criminal proceedings may be appended to the main judgment.
4. The competent panel of the trial court or the appeals court may release its written judgment at the time the judgment is pronounced under Article 293.
5. The written judgment must be released within a maximum of thirty working days from the date on which the judgment of the competent panel of the trial court or appeals court was pronounced under Article 293.

6. The prosecutor and the defense must be served with a copy of the written judgment in accordance with Article 27.
7. The judgment must be entered into the appeal file.

Commentary

Paragraph 3: In contrast to the judgment of the trial court, separate or dissenting opinions may be drafted by individual judges and published with the main appeals court judgment.

Part 3: Interlocutory Appeals

General Commentary

An *interlocutory appeal* is an appeal that is heard before the trial court has delivered its verdict.

Article 295: Interlocutory Appeals

An interlocutory appeal may be filed against the following decisions or orders of the court:

- (a) an order that a person pay a fine for misconduct before the court under Article 40;
- (b) an order that a person pay a fine for noncompliance with a court order under Article 41;
- (c) the seizure of a person's property in the course of a criminal investigation;
- (d) an order for noncompliance with an order of the prosecutor for the expedited preservation of computer data and telecommunications traffic data under Article 128(6);
- (e) an order for noncompliance with an order of the prosecutor to identify a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 129(6);
- (f) an order for the temporary seizure of proceeds of crime and property, equipment, or other instrumentalities used in or destined for use in a criminal offense under Article 133;
- (g) an order for confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense under Article 298, where the applicant is a person other than an accused person;
- (h) an order for confiscation of proceeds of crime or of property of corresponding value under Article 299;
- (i) an order for protective measures under Article 150 or Article 151, or an order for anonymity under Article 159;
- (j) a decision on detention, continued detention, bail, or restrictive measures other than detention under Chapter 9, Part 3;
- (k) a decision on a preliminary motion pursuant to Article 212;

- (l) a decision on the exclusion of evidence under Article 230; or
- (m) a decision on extradition under Article 315.

Commentary

After agreeing on the fact that the MCCP should provide an interlocutory appeal mechanism, the drafters of the MCCP discussed what matters could be appealed to the appeals court. The drafters were concerned that creating too many grounds for interlocutory appeal would overburden an already overworked and under-resourced post-conflict criminal justice system and would work against the principle of judicial economy. In order to draft the provisions on interlocutory appeals, research was conducted on the types of interlocutory appeals provided for around the world. In finalizing the list of orders and decisions included in Article 295, the drafters considered the sorts of decisions that could be made by judges or panels of judges under the MCCP during the pretrial or trial phase and that were particularly sensitive or that restricted the rights of the suspect, the accused, or another person significantly so as to merit review by a higher court. For example, an order for anonymity greatly impedes upon the suspect or the accused person's right to examine a witness under Article 64. An order for temporary seizure of property impinges upon the property rights of a suspect or an accused, and orders for detention or restrictive measures impinge upon the person's right to liberty. In addition to allowing for interlocutory appeals on orders that potentially infringe upon the rights of the suspect or accused, the drafters of the MCCP also considered an appeal mechanism on the basis of preliminary motions to be necessary.

In some instances, an interlocutory appeal will be made by a party other than the prosecutor or the defense. For example, a third party may appeal an order for temporary seizure under Article 133 where the person has a property or other interest in the items seized (reference should be made to the commentary to Article 133 for a discussion of this). Where a person has been ordered to pay a fine under Article 41 for non-compliance with a court order for misconduct before the court, he or she may appeal the decision by way of interlocutory appeal. A third party may also want to appeal an order for noncompliance with an order of the prosecutor for the expedited preservation of computer data and telecommunications traffic data or for the identification of a subscriber, owner, or user of a telecommunications system or point of access to a computer system under Article 128(6) and 129(6), respectively.

Paragraph c: As required by Article 114(9), where a person's property has been seized by the police in the course of a criminal investigation, the person is entitled to appeal by way of interlocutory appeal. For example, a person may appeal the seizure of property that was carried out pursuant to a warrant, such as a warrant to search premises or dwellings or a warrant to search a person. A person may also appeal where the police had a warrant but where they exceeded the scope of the warrant and took property not referenced in the warrant (this is the equivalent of not having a warrant in the first place). Moreover, an interlocutory appeal may be brought where a person's prop-

erty has been seized by the police without a warrant where a warrant is required under the MCCP.

Article 296: Procedure for Seeking an Interlocutory Appeal

1. An appellant must commence an interlocutory appeal by filing a written statement with the registry of the competent trial court within five working days of the date the party was notified of the order that is being challenged.
2. After a written statement is filed, the registry must notify the respondent in accordance with Article 27.
3. The respondent may file a written response with the registry of the competent trial court within five working days of notification of the appeal statement.
4. An interlocutory appeal does not suspend proceedings, except where an appeal under Article 295(a), 295(h), or 295(i) is filed.

Commentary

In drafting Article 296, the drafters discussed whether the filing of an interlocutory appeal should halt proceedings completely. In some jurisdictions, the filing of an interlocutory appeal suspends proceedings until its determination, whereas in other jurisdictions, the proceedings continue on in parallel with the appeal. The MCCP drafters decided that only some kinds of interlocutory appeals should suspend proceedings. Part of the drafters' rationale was the danger of interlocutory appeals being used as a mechanism to delay proceedings by a party filing multiple unfounded appeals.

Article 297: Determination of an Interlocutory Appeal

1. The registry of the trial court must forward a copy of the case file, the written appeal statement, and the written response to the appeal statement, if any, to the registry of the appeals court within two working days from the filing of a written response with the registry or upon the expiration of five days after notification of the respondent about the appeal statement.

2. The registry of the competent trial court must also forward the sealed record of a witness anonymity hearing, where an appeal under Article 295(a) is filed.
3. The competent panel of the appeals court may at its discretion request any other relevant material from the competent trial court.
4. The competent panel of the appeals court must make a decision on the interlocutory appeal within two working days of receiving the case file and the other materials set out in Paragraph 1.
5. The appeal must be decided by the appeals court on the basis of the appeal statement, the written response, if any, and the case file.
6. A written and reasoned decision of the competent panel of the appeals court must be prepared.
7. The decision of the competent panel of the appeals court must be served as soon as possible, and no later than two working days in accordance with Article 27, on the prosecutor, the defense, and on other appellants if the appeal was not made by the prosecutor or the defense.

Commentary

As discussed in the general commentary to Chapter 12, an interlocutory appeal, in contrast to appeals against acquittal, conviction, or a penalty, is determined wholly through examination of written submissions and evidence rather than by way of oral proceedings. This form of paper review is common in many states and serves the principle of judicial economy by not requiring the court to conduct a full hearing. Because an interlocutory appeal is not an appeal based on a conviction or sentence, the requirements detailed in the general commentary to Chapter 12 (i.e., that the appeal must respect the requirements of a fair and public trial) do not apply and there is no obligation that the appeal be determined in public.

Chapter 13: Confiscation

General Commentary

The MCC provides for two types of confiscation: (1) confiscation of property, equipment, or other instrumentalities used in or destined for use in a criminal offense (Article 61) and (2) confiscation of proceeds of crime or of property of corresponding value (Articles 70–73). Reference should be made to the commentaries to Article 60 and Articles 70–73. Confiscation under Article 61 of the MCC is a security measure and an additional penalty aimed at confiscation of items used in or destined for use in a criminal offense; confiscation under Articles 70–73 of the MCC is limited to confiscation of proceeds of crime and can involve property only in the amount corresponding to the proceeds of crime.

Some state legislation aimed at the recovery of assets from an accused or third party includes a reversal of the burden of proof in the assumption that the assets are the proceeds of crime which the owner of the assets must rebut. In other states, there is a reduction in the standard of proof to the balance of probabilities that the property represents the proceeds of crime rather than the usual test of proof beyond reasonable doubt. Many criminal justice systems have introduced such an approach (some even utilize civil forfeiture, where proceeds of crime can be confiscated in civil procedures under a lower standard of proof not requiring conviction). This approach has also been promoted by some international instruments, most notably the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism and the United Nations Convention against Corruption. Although the reversal of the burden of proof infringes on the presumption of innocence (see the commentary to Article 56 of the MCCP), courts of many jurisdictions (including the European Court of Human Rights) have ruled that the reversal of the burden of proof can be consistent with the right to a fair trial if the standard is regulated and implemented with proper safeguards. Given that this approach is controversial and requires an established criminal justice system and a complex set of procedural rules and safeguards (which are not often found in a post-conflict state), the drafters of the MCCP opted for a more traditional approach to confiscation where burden of proof remains with the prosecution.

Chapter 13 outlines the basic procedure the court must follow to order confiscation, which is the permanent deprivation of property by a court order. Confiscation is a measure that is ordered at the end of criminal proceedings. It is often preceded by preservation and seizure of proceeds of crime and property used in or destined for use in a criminal offense (see Article 133 of the MCCP and the accompanying commentary). In both types of confiscation, the interests of third parties—persons other than the accused who are the legal owners or have a legal interest in the property—must be taken into consideration. As a general rule, any confiscation order by the court must be reasonable and proportionate.

Article 298: Confiscation of Property, Equipment, or Other Instrumentalities Used in or Destined for Use in a Criminal Offense

1. Property, equipment, or other instrumentalities used in or destined for use in the commission of criminal offense may be confiscated by an order of the trial court under Article 61 of the MCC. Confiscation must be reasonable and proportionate.
2. The trial court may order confiscation under Paragraph 1 on the request of the prosecutor or the victim or on its own motion.
3. Confiscation may be ordered following a conviction for a criminal offense.
4. Certain objects, equipment, or other instrumentalities may be confiscated even where the criminal proceedings do not end in a conviction where:
 - (a) the court determines beyond reasonable doubt that the instrumentalities may be used in the commission of a criminal offense;
 - (b) confiscation is required by the interest of general safety of the public and property; or
 - (c) the item or items in question are subject to mandatory seizure and confiscation or they represent prohibited items under the applicable law.
5. A copy of the order on confiscation must be served in accordance with Article 27 on:
 - (a) the prosecutor;
 - (b) the accused; and
 - (c) the person who is the legal owner of or has a legal interest in the property or items subject to confiscation if he or she is a person other than the accused and where that person is known to the court.
6. Where property or items are confiscated from an accused following a judgment in which the accused is found criminally responsible for a criminal offense, the accused may appeal confiscation in the appeal against conviction under Article 274(1)(c) of the MCCP.
7. Where the order is made under Paragraph 4 or where the confiscation order refers to property or items that a person other than the accused is the legal owner of or has a legal interest in the order may be appealed under Article 295.

Article 299: Confiscation of Proceeds of Crime or of Property of Corresponding Value

1. The court may order confiscation of proceeds of crime or of property of corresponding value from the accused or from a third party under Chapter 13 of the MCC. Confiscation must be reasonable and proportionate.
2. The prosecutor must submit to the trial court all relevant information and data required for the determination of the amount of the proceeds of crime.
3. Proceeds of crime or property of corresponding value may be confiscated following a conviction for a criminal offense.
4. Where criminal proceedings do not end in a conviction, proceeds of crime or property of corresponding value may be confiscated when the court establishes beyond a reasonable doubt that:
 - (a) a criminal offense has been committed; and
 - (b) the property subject to confiscation derives from or is obtained directly or indirectly from this criminal offense.
5. A copy of the order for confiscation must be served in accordance with Article 27 on:
 - (a) the prosecutor;
 - (b) the accused; and
 - (c) the person who is the legal owner of or has a legal interest in the property or items subject to confiscation, if that is a person other than the accused and where that person is known to the court.
6. Where confiscation is ordered following a judgment in which the accused is found criminally responsible for a criminal offense, the accused may appeal confiscation in the appeal against conviction under Article 274(1)(c) of the M CCP.
7. Where the order is made under Paragraph 6 or where the confiscation order refers to property that a person other than the accused is the legal owner of or has a legal interest in the order may be appealed under Article 295.

Article 300: Rights of Third Persons

1. Before the court orders confiscation under Article 298 or Article 299 of property or items that a person other than the accused is the legal owner of or has a legal interest in (a “third party”), that person must be given an opportunity to be heard by the court and be questioned as a witness. Where a third party is a legal person, the legal person must be heard and questioned through a representative.
2. Where, during criminal proceedings, the court has reasons to believe that confiscation under Article 298 or Article 299 may be made and where it involves the interest of a third party, the court must promptly notify the third party of the proceedings in accordance with Article 27.
3. The third party must be notified of the following:
 - (a) that criminal proceedings are being conducted before the court that may result in confiscation of the third party’s property as proceeds of crime; and
 - (b) the right of the third party under Paragraph 4.
4. The third party has the right to:
 - (a) be notified by the court in advance of all hearings that take place during the trial;
 - (b) participate in the proceedings;
 - (c) have access to and inspect evidence under similar conditions as the defense;
 - (d) propose evidence in relation to the matter of confiscation; and
 - (e) pose questions to witnesses with the permission of the trial court.
5. If the third party fails to appear at the hearing despite being properly informed of the date of the hearing, the hearing may be conducted in his or her absence.

Article 301: Subsequent Challenge of Confiscation by a Third Party

1. A person other than the accused who is the legal owner of or has a legal interest in property subject to confiscation under Articles 298 and 299 may, after the confiscation order has been executed, appeal the confiscation under Article 295 in the following circumstances:
 - (a) when the order was issued the person was an owner of or had a legal right in the confiscated property or item; and
 - (b) he or she could not exercise the rights under Article 300 through no fault of his or her own.
2. A subsequent challenge of confiscation by a third party under Article 301 may be made within two years of the confiscation order having been issued.
3. A person making a subsequent challenge of confiscation under Article 295 must appeal the confiscation within thirty days of learning about the confiscation order.

Chapter 14: Mutual Legal Assistance and Extradition

Part 1: Mutual Legal Assistance

General Commentary

Mutual legal assistance refers to the provision of legal assistance by one state to another state in the investigation, prosecution, or punishment of criminal offenses. Given the transborder nature of criminality, such as organized crime, trafficking in persons and drugs, smuggling in persons, and so forth, mutual legal assistance is an invaluable tool. Mutual legal assistance is usually governed by bilateral or multilateral legal assistance treaties that regulate the scope, limits, and procedures for such assistance, although domestic legislation will suffice in many cases. Treaties are often supplemented by domestic legislation in a criminal procedure code or as a separate piece of legislation. Mutual legal assistance may also be given informally through bilateral cooperation and the sharing of information between policing or judicial officials in different states.

Most international and regional crime conventions contain provisions on mutual legal assistance relevant to their specific subject matter, all of which are listed in the subsection “Legal Instruments” of Further Reading and Resources toward the end of the volume. These treaties place specific requirements on states that have signed and ratified these treaties. In addition, the Arab League Convention on Mutual Assistance in Criminal Matters, the Inter-American Convention on Mutual Legal Assistance in Criminal Matters (and its optional protocol), the Economic Community of West African States Convention on Mutual Assistance in Criminal Matters, and the European Convention on Mutual Legal Assistance in Criminal Matters (and its two additional protocols) deal specifically with mutual legal assistance at a regional and subregional level. The United Nations has drafted the United Nations Model Treaty on Mutual Assistance in Criminal Matters (which is supplemented by a *Revised Manual on the Model Treaty on Extradition and the Model Treaty on Mutual Assistance in Criminal Matters* that was drafted by the United Nations Office on Drugs and Crime). Other useful references on mutual legal assistance are the United Nations International Drug Control Programme (UNDCP; now United Nations Office on Drugs and Crime) Model Mutual Legal Assistance in Criminal Matters Bill, the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*, and the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols* (which contain detailed descriptions of international mutual legal assistance requirements and samples of domestic legislation), and the Mutual Legal Assistance Treaty Creator, developed by the United Nations Office on Drugs and Crime, a program to assist states in designing and drafting mutual legal assistance treaties.

In drafting Part 1 of Chapter 14, the drafters drew largely upon the international and regional conventions to develop the framework and implementation structure for the delivery and receipt of mutual legal assistance. Given that the implementation of mutual legal assistance measures in another state is largely a matter for that state and therefore is beyond the legislative scope of a requesting state, the MCCP deals mostly with the situation where mutual legal assistance is requested from another state.

Article 302: General Principles Governing the Provision of Mutual Legal Assistance

[Insert name of state] will provide other states with the widest measures of mutual legal assistance in investigations, prosecutions, and judicial proceedings through treaties, bilateral or multilateral agreements, or the MCCP.

Commentary

This general principle—that states will provide each other with the widest degree of assistance—is taken from Article 18(1) of the United Nations Convention against Transnational Organized Crime, which is duplicated in Article 46(1) of the United Nations Convention against Corruption.

Article 303: Application of Treaties, Agreements, and the MCCP to Mutual Legal Assistance

1. The provisions of the MCCP do not affect the obligations of [insert name of state] under any treaty or bilateral or multilateral agreements governing mutual legal assistance in whole or in part.
2. Chapter 14, Part 1 of the MCCP applies to requests for mutual legal assistance where no treaty or bilateral or multilateral agreement exists.
3. [Insert name of state] and another state with which it has a mutual legal assistance treaty or agreement may opt to apply Chapter 14, Part 1 of the MCCP instead of the treaty or agreement, particularly where doing so would facilitate greater cooperation and assistance.

Commentary

A criminal procedure code exists independently of any mutual legal assistance treaties or other agreements. In a state where no such agreements or treaties exist—common in many post-conflict states, where legislative reform may have been neglected for years during conflict—this code, supplemented by the provisions of the M CCP or mutual legal assistance, could serve as a primary source of mutual legal assistance. Where international conventions or agreements exist, the relevant state may thus opt to apply the provisions of the code on mutual legal assistance. The use of the code rather than a pre-existing agreement would be most relevant where the agreement was outdated or unclear and did not serve to facilitate the same degree of cooperation and assistance as the code. The post-conflict state, cognizant of the need to afford the widest possible degree of cooperation to a requesting state, may opt to apply the code in lieu of other conventions or agreements. Article 303 is based on the sentiment expressed in Article 18(7) of the United Nations Convention against Transnational Organized Crime, which urges states parties to apply the provisions of the convention instead of other bilateral or multilateral agreements if this would facilitate cooperation.

Article 304: Measures of Mutual Legal Assistance

1. [Insert name of state] must afford mutual legal assistance to a requesting state for any of the following purposes:
 - (a) taking of evidence or statements from persons;
 - (b) effecting production orders;
 - (c) effecting service of judicial documents;
 - (d) effecting searches and seizures, including searches and seizures relating to computer systems and stored computer data;
 - (e) identifying, tracing, seizing, and confiscating proceeds of crime, property, instrumentalities, or other things for evidentiary purposes;
 - (f) undertaking covert or other technical measures of surveillance or investigation;
 - (g) effecting an order for expedited preservation of computer data or telecommunications data;
 - (h) examining objects and sites;
 - (i) providing information, evidentiary items, and expert evaluations;

- (j) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate, or business records;
 - (k) facilitating the voluntary appearance of persons in the requesting state;
 - (l) facilitating hearings by video conference or telephone conference or other means of conferencing;
 - (m) affording protective measures to witnesses under threat;
 - (n) providing copies of government records, documents, or information that is available to the public under the applicable law of [insert name of state]; and
 - (o) any other type of assistance that is not contrary to the applicable law in [insert name of state].
2. [Insert name of state] may also afford another state the following measures of mutual legal assistance:
- (a) the provision of information relating to criminal matters where the authorities in [insert name of state] believe such information could assist the authorities in another state in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request by the other state for measures of mutual legal assistance under Paragraph 1; and
 - (b) the provision of copies, in whole or in part, of government records, documents, or information that is not available to the public under the applicable law of [insert name of state].

Commentary

Paragraph 1: Paragraph 1 contains a list of measures of mutual legal assistance that a requested state could provide to a requesting state under the M CCP. The list of measures has been sourced to a large degree from Article 2 of the United Nations Model Treaty on Mutual Legal Assistance in Criminal Matters, Articles 10 and 19 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, Article 18(3) of the United Nations Convention against Transnational Organized Crime, Article 46(3) of the United Nations Convention against Corruption, and Articles 29–34 of the Council of Europe Convention on Cybercrime, although additional measures have been added based on the provisions of the M CCP (including the various investigative measures that may be undertaken under the M CCP).

Paragraph 2: The measures listed under Paragraph 2 are inspired by Articles 18(4) and 18(29)(b) of the United Nations Convention against Transnational Organized Crime.

Article 305: Central Authority for Receiving and Transmitting Requests for Mutual Legal Assistance

1. A central authority for receiving and transmitting requests for mutual legal assistance must be established by the competent legislative authority.
2. The central authority is responsible for receiving and transmitting requests for mutual legal assistance.
3. The central authority must transmit all requests for mutual legal assistance to the competent trial court for a hearing under Article 307. The competent trial court must then decide on the permissibility of the request and the manner in which it must be executed, if at all.
4. Where the competent trial court orders the execution of requests for mutual legal assistance under Article 307, the central authority must inform the competent authorities responsible for their execution.
5. The central authority must ensure the speedy and proper execution of requests for mutual legal assistance and must keep the requesting state informed of the progress and outcome of the request for mutual legal assistance.
6. The existence of the central authority does not prejudice direct contacts between the judicial authorities in [insert name of state] and the judicial authorities in another state and requests for mutual legal assistance through these channels.
7. Where direct contacts have been made between the judicial authorities in [insert name of state] and the judicial authorities in another state, the relevant communications must be forwarded to the central authority.
8. In urgent cases, a request may also be transmitted by the judicial authorities or the police of another state through the International Criminal Police Organization (INTERPOL). The request must state the reasons for the urgency.
9. Where direct contacts have been made between INTERPOL and the judicial authorities in [insert name of state], the relevant communications must be forwarded to the central authority.

Commentary

Requests for mutual legal assistance of the sort outlined in Part 1 do not go directly to the judiciary, the police, or the prosecution but instead should be directed to a designated central authority. This requirement is contained in Article 3 of the United Nations *Model Treaty on Mutual Assistance in Criminal Matters*, Article 18(13) of the United Nations Convention against Transnational Organized Crime, and Article 46(13) of the United Nations Convention against Corruption, along with a number of additional requirements/duties that the central authority must undertake. This central authority acts as the focal point for requests for mutual legal assistance. It is required to pass on requests for mutual legal assistance to the competent court for a formal hearing under Article 307. Where a request is granted, the central authority must ensure that the body required to implement the order (e.g., the policing authority) carries out the order from the trial court. The central authority must also keep the requesting state informed about how the request for mutual assistance is proceeding and the outcome of the request.

The transmission of a request for mutual legal assistance is not the only method by which a state can obtain assistance from another state in a criminal investigation. The judicial authorities in one state may make direct contact with those in another state, a procedure that is usually completed in the format of “letters rogatory” (a request from a court to a foreign court for legal assistance in the absence of a treaty or agreement, which is done through diplomatic channels). Police and judicial authorities may also make informal contact with each other, which may lead to informal information sharing (to the extent permissible under the applicable law). Where a request is made directly between judicial authorities, the MCCP requires that the central authority—given its coordinating role in the provision of mutual legal assistance—be informed. In urgent cases, as set out in Article 46(13) of the United Nations Convention against Corruption and Article 18(13) of the United Nations Convention against Transnational Organized Crime, a request for assistance under the MCCP may also be transmitted to the judicial authorities through INTERPOL.

Article 306: Form of a Request for Mutual Legal Assistance

1. A request for mutual legal assistance transmitted to the central authority in [insert name of state] must contain the following:
 - (a) the identity of the authority making the request;
 - (b) the subject matter and nature of the investigation, prosecution, or judicial proceedings to which the request relates and the name and functions of the authority conducting the investigation, prosecution, or judicial proceedings;

- (c) a summary of the relevant facts, except in relation to a request for the service of documents;
 - (d) a statement or text of the relevant law, except in relation to a request for the service of documents;
 - (e) a description of the assistance sought and details of any particular procedure that the requesting state wishes to be followed in order to comply with its applicable law;
 - (f) any deadlines that must be complied with and the reasons for the deadlines;
 - (g) where possible, the identity, location, and nationality of any person concerned;
 - (h) the purpose for which the evidence, information, or action is sought; and
 - (i) any other relevant documents.
2. Requests for mutual legal assistance, and any documents supporting them, must be in or be accompanied by a translation into an official language of [insert name of state], unless the central authority exempts the requesting state from this obligation.
 3. Requests for mutual legal assistance and any other communications relating to mutual legal assistance may be forwarded by or addressed to the central authority through any electronic or other means of telecommunication provided that the original and the written record of the request or any other communication can be produced upon demand.
 4. The central authority or the competent trial court may require that an irregular or incomplete request be modified or completed without that requirement precluding the possibility of the authority or court taking provisional measures prior to the receipt of the modified request.
 5. The central authority or competent trial court may request additional information where such information appears necessary for the execution of the request in accordance with the applicable law in [insert name of state] or where the additional information could facilitate execution of the request.

Commentary

Paragraph 1: Paragraph 1 draws on and augments the provisions of Article 18(15) of the United Nations Convention against Transnational Organized Crime, Article 46(15) of the United Nations Convention against Corruption, and Article 5 of the United Nations *Model Treaty on Mutual Assistance in Criminal Matters*.

Paragraph 2: This paragraph is taken from Article 5(2) of the United Nations *Model Treaty on Mutual Assistance*.

Paragraph 3: This paragraph is inspired by Article 18(14) of the United Nations Convention against Transnational Organized Crime and Article 46(14) of the United Nations Convention against Corruption.

Paragraph 5: Paragraph 5 is inspired by Article 5(3) of the United Nations *Model Treaty on Mutual Assistance*.

Article 307: Hearing of a Request for Mutual Legal Assistance

1. A request for mutual legal assistance must be heard by a panel of three judges of the trial court.
2. Mutual legal assistance may be refused by the competent trial court where:
 - (a) the request is not made in conformity with Article 306;
 - (b) [insert name of state] considers that the execution of the request is likely to prejudice its sovereignty, security, public order, or other essential interests;
 - (c) domestic law in [insert name of state] prohibits the authorities from carrying out the actions requested with regard to a similar criminal offense had it been subject to investigation, prosecution, or judicial proceedings in [insert name of state];
 - (d) it would be contrary to the applicable law of [insert name of state] for the request to be granted;
 - (e) the investigation, prosecution, or judicial proceedings in the requesting state are not consistent with internationally recognized human rights standards;
 - (f) there are grounds to believe that the request has been made for the purpose of prosecuting or punishing a person on account of his or her race, gender, sex, national or ethnic origin, religion, political or ideological opinions, position, or membership in a particular social group or that the person may be discriminated against for any of these reasons;
 - (g) cooperation with the request for mutual legal assistance may lead to judicial proceedings by a court of exceptional jurisdiction or where the request concerns the enforcement of a penalty passed by a court of exceptional jurisdiction;

- (h) any of the facts in question are punishable by the death penalty or with a penalty that would result in the irreversible injury of a person's bodily integrity;
 - (i) the request is made in relation to a criminal offense that is under investigation in [insert name of state];
 - (j) the person in question has previously been finally convicted or acquitted of the criminal offense in question as provided for in Article 8 of the MCC; or
 - (k) the act does not constitute a criminal offense under domestic criminal law, except if the criminal offense is an internationally recognized criminal offense, including, but not limited to, genocide, crimes against humanity, war crimes, organized crime, trafficking in persons, migrant smuggling, money laundering, corruption, serious drug offense, sale of children, child prostitution and child pornography, and terrorist offenses.
3. Request for mutual legal assistance may not be refused by the competent trial court:
 - (a) on the grounds of secrecy of banks or other similar financial institutions;
 - (b) on the sole ground that the criminal offense is considered to involve fiscal matters; or
 - (c) on the sole ground that it relates to acts for which a legal person is not liable in [insert name of state].
 4. Prior to refusing a request, the competent trial court must consider whether mutual legal assistance may be granted subject to certain conditions. Where the requesting state accepts assistance under these conditions, the trial court may grant the request for mutual legal assistance.
 5. Where no grounds for the refusal of a request for mutual legal assistance exist, the competent trial court must order the execution of the request.
 6. After ordering that a request for mutual legal assistance should be granted, the competent trial court may postpone the execution of the request on the grounds that it interferes with an ongoing investigation, prosecution, or judicial proceedings.
 7. The order of the competent trial court must be in writing and must contain:
 - (a) the name of the competent trial court and the identity of the authority that made the request;
 - (b) a description of the assistance granted to the requesting authority;
 - (c) details of any particular procedure that the requesting state wishes to be followed to comply with its applicable law;

- (d) details of any deadlines to be complied with in the execution of the order;
 - (e) the identity, location, and nationality of any person concerned, where this information was provided by the requesting state;
 - (f) the purpose for which the evidence, information, or action is sought;
 - (g) the date on which the assistance may be executed;
 - (h) the body responsible for executing the order for assistance;
 - (i) a request to the requesting state to notify the central authority promptly if assistance is no longer required;
 - (j) the date of the order; and
 - (k) the name and signature of the competent judge.
8. The order of the competent trial court granting the request for mutual legal assistance must be promptly forwarded to the requesting state by the central authority.
 9. Where the competent trial court refuses to grant a request for mutual legal assistance, it must prepare a written decision giving reasons for the refusal. The central authority must promptly forward the written decision to the requesting state.
 10. Where the competent trial court orders the postponement of the execution of the order granting the request for mutual legal assistance, it must prepare a written decision giving reasons for the postponement. The central authority must promptly forward the written decision to the requesting state.

Commentary

Paragraph 1: A judicial determination is required once a request for mutual legal assistance is received by the central authority.

Paragraph 2: Paragraph 2 is inspired by Article 18(21) of the United Nations Convention against Transnational Organized Crime, Article 46(21) of the United Nations Convention against Corruption, Article 4 of the United Nations Model Treaty on Mutual Assistance in Criminal Matters, domestic legislation on mutual legal assistance, and international human rights jurisprudence (relating to Paragraph 2[e]–[h]).

Paragraph 2(k): Under Paragraph 2(k), a request for mutual legal assistance may be refused where the criminal offense in question is not also a criminal offense in the requested state. This is subject to the exception that a refusal may not be made where the criminal offense—while not recognized in the requesting state—is recognized internationally. The offenses listed in Paragraph 2(k) are those that are recognized in various international treaties. The rationale behind Paragraph 2(k) is to ensure that

the broadest possible measures of mutual legal assistance be provided by the requested state. Where the legal framework of the requested state does not provide for the offenses listed in Paragraph 2(k), given the serious nature of these offenses and their international recognition, this must not be used as an excuse to refuse assistance.

Paragraph 3: This paragraph draws on Article 18(8) and (22) of the United Nations Convention against Transnational Organized Crime and Article 46(8) and (22) of the United Nations Convention against Corruption.

Paragraph 4: This paragraph draws on Article 18(26) of the United Nations Convention against Transnational Organized Crime and Article 46(26) of the United Nations Convention against Corruption.

Paragraphs 5, 7, 8, 9, 10: Once the court finds that no grounds to refuse a request for mutual legal assistance exist, taking into account Paragraph 2, it must make an order for mutual legal assistance. This order must be transmitted to the central authority, which, under Article 305, is required to pass the order on to the authority responsible for carrying it out. Where grounds to refuse the request for mutual legal assistance exist or where the court postpones the execution of an order for mutual legal assistance, the court must draft a written decision. The central authority must transmit the order for mutual legal assistance or the written decision refusing it to the requesting state immediately.

Paragraph 6: This paragraph is inspired by Article 18(25) of the United Nations Convention against Transnational Organized Crime and Article 46(25) of the United Nations Convention against Corruption.

Article 308: Execution of a Request for Mutual Legal Assistance

1. A request for mutual legal assistance must be executed in accordance with the applicable law in [insert name of state], to the extent that it is not contrary to the domestic law of the requesting state, and, where possible, in accordance with the procedures and formalities specified in the request.
2. Where the competent trial court orders the execution of a request for mutual legal assistance under Article 307, the central authority must forward the order to the competent authorities responsible for its execution.
3. The request for mutual legal assistance must be executed as soon as possible and must take as full account as possible of any deadlines suggested by the requesting state and any procedures outlined in the order.

4. The requesting state may make reasonable requests for information on the status and progress of measures taken by the authorities in [insert name of state].
5. The central authority in [insert name of state] must respond to reasonable requests by the requesting state about the progress of its handling of the request.
6. The requesting state must promptly inform the authorities in [insert name of state] when assistance is no longer required.
7. In executing a request for mutual legal assistance, the authorities in [insert name of state] may take measures for the protection of witnesses.

Commentary

Paragraph 1: This paragraph is inspired by Article 6 of the United Nations Model Treaty on Mutual Assistance in Criminal Matters.

Paragraphs 3–6: These paragraphs draw upon Article 18(24) of the United Nations Convention against Transnational Organized Crime and Article 46(24) of the United Nations Convention against Corruption.

Article 309: Execution of a Request to Facilitate the Appearance of a Person in a Requesting State

1. In the execution of a request for the facilitation of the appearance of a person in the requesting state under Article 304(1)(k), where the person is detained or imprisoned in [insert name of state], the request may be granted only where:
 - (a) the person freely gives his or her informed consent; and
 - (b) the authorities of both states agree, subject to such conditions as both states deem appropriate.
2. In the execution of the request, the requesting state has authority to keep the person transferred in detention, unless otherwise requested or authorized by [insert name of state].

3. The requesting state must implement its obligations without delay and must return the transferred person back to [insert name of state] as agreed beforehand.
4. The requesting state must not require [insert name of state] to initiate extradition proceedings for the return of the transferred person.
5. The transferred person must receive credit for service in [insert name of state] for any time spent in detention in the requesting state.
6. Unless the states agree otherwise, the transferred person, whatever his or her nationality, must not be prosecuted, detained, punished, or subjected to any other restriction of his or her liberty in the requesting state in respect of acts, omissions, or convictions prior to his or her departure from the requesting state.

Commentary

Article 309 is based on Article 18(10)–(12) of the United Nations Convention against Transnational Organized Crime and Article 46(10)–(12) of the United Nations Convention against Corruption.

Article 310: Use of Information Obtained from a Request for Mutual Legal Assistance

The requesting state may not transmit or use information or evidence furnished by [insert name of state] for investigations, prosecutions, or judicial proceedings other than those stated in the request without the prior consent of [insert name of state].

Commentary

Article 310 is inspired by Article 8 of the United Nations Model Treaty on Mutual Assistance in Criminal Matters.

Article 311: Costs of Executing a Request for Mutual Legal Assistance

1. The ordinary costs of executing a request for mutual legal assistance are borne by [insert name of state], unless otherwise agreed by [insert name of state] and the requesting state.
2. Where expenses of a substantial or extraordinary nature are or will be required to fulfill the request for mutual legal assistance, [insert name of state] and the requesting state must consult to determine the terms and conditions under which the request will be executed and the manner in which the costs will be borne.

Commentary

Article 311 draws on Article 18(28) of the United Nations Convention against Transnational Organized Crime and Article 46(28) of the United Nations Convention against Corruption. A resource-starved post-conflict state may have great difficulty paying the ordinary costs of executing a request for mutual legal assistance. In many cases, mutual legal assistance may be viable only if the requesting state contributes financially to the execution of the request. The requesting state and the requested state should discuss this situation upon the submission of the request.

Part 2: Extradition

General Commentary

Extradition is a formal process conducted through treaties and other legislation that define the process and conditions under which a person in one state can be sent to another state to be tried or to serve a sentence. Effective extradition legislation and treaty procedures are especially important for transnational offenses where the perpetrator of a criminal offense has fled to another state.

Extradition is regulated by bilateral or multilateral extradition treaties or agreements or by domestic legislation (and sometimes by a combination of them). Examples of multilateral extradition treaties include the Economic Community of West African States Convention on Extradition, the European Convention on Extradition (and its additional protocols), and the Inter-American Convention on Extradition. Other treaties, such as those listed in the subsection “Legal Instruments” of Further Reading and Resources toward the end of this volume, address extradition. Treaties such as the United Nations Convention against Transnational Organized Crime (and its additional protocols on trafficking in persons and migrant smuggling) and the United Nations Convention against Corruption have provisions that states parties may use as a substitute for a dedicated extradition agreement (although only with regard to the extradition of persons in connection with organized crime, trafficking in persons, smuggling of migrants, illicit manufacture and trafficking in firearms and ammunition, and corruption).

Treaties are often supplemented by legislation that addresses many of the operational issues relating to the request for and granting of extradition. Chapter 14, Part 2 assumes the absence of any extradition treaties or agreements and provides a general framework and legislative basis for the extradition of persons to a requesting state.

Where a post-conflict state is drafting an extradition treaty, reference may be made to the United Nations Model Treaty on Extradition and other international treaties or conventions that address the issue (see “Legal Instruments,” in the “Further Reading” section in this volume). Reference may also be made to the United Nations Model Law on Extradition drafted by the United Nations Office on Drugs and Crime and the revised manuals that accompany the United Nations Model Treaty on Extradition and the United Nations Model Treaty on Mutual Assistance in Criminal Matters, also drafted by the United Nations Office on Drugs and Crime. In addition, reference should be made to the *Legislative Guide to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* and the *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*, which contain detailed descriptions of extradition requirements and samples of domestic legislation.

Chapter 14, Part 2 draws inspiration from the various international and regional extradition treaties, in addition to other treaties that deal in part with extradition.

A number of terms are used repeatedly throughout Part 2. The term *requesting state* refers to a state that makes a request for extradition to another state. The state that receives a request for extradition is called the *requested state*. The person who is the subject of the request for extradition is referred to as the *person sought*.

Article 312: Application of Treaties and the M CCP to Extradition

1. The provisions of the M CCP do not affect the obligations of [insert name of state] under any bilateral or multilateral extradition treaties.
2. Chapter 14, Part 2 applies to extradition where bilateral or multilateral extradition treaties do not exist between a state requesting the extradition of a person and [insert name of state].
3. Chapter 14, Part 2 of the M CCP does not apply to the surrender of persons to the International Criminal Court or international criminal tribunals.

Commentary

The M CCP exists independently of any extradition treaties or other agreements. In a state where no such agreements or treaties exist—which is common in many post-conflict states where legislative reform may have been neglected for years during conflict—the M CCP could act as the legal source of extradition. Where bilateral or multilateral treaties or agreements are in place between a post-conflict state and another state, these treaties and agreements will serve as the applicable law with regard to extradition.

Paragraph 3: With regard to the International Criminal Court, part 9 of its governing statute on International Cooperation and Judicial Assistance sets out the applicable surrender regime. Article 102 of the Rome Statute of the International Criminal Court distinguishes surrender from extradition, with the former being “the delivering up of a person by a state to the Court” and the latter being “the delivering up of a person by one State to another as provided for by Treaty, Convention or national legislation.” When a request is made to a state by the International Criminal Court for the surrender of a person, the applicable law will be the statute of the International Criminal Court and any domestic implementing legislation.

Article 313: Instituting a Request for Extradition

1. A request for extradition must be in writing and must be filed by a requesting state through the competent body for receiving requests for extradition, which may be:
 - (a) diplomatic channels;
 - (b) the ministry of justice; or
 - (c) any other designated authorities in [insert name of state].
2. The request for extradition must be accompanied by the following:
 - (a) as accurate a description as possible of the person sought, together with any other information to establish his or her identity, including photographs, fingerprints, or similar means of identification;
 - (b) a certificate or other documents relating to the nationality of the person whose extradition is sought;
 - (c) a description of the location of the person being sought;
 - (d) the text of the relevant provision of law containing the criminal offense and a statement of the relevant penalties that can be imposed for the offense;
 - (e) where extradition is requested for the purpose of prosecution in the requesting state, evidence that the person committed a criminal offense;
 - (f) where an arrest warrant or indictment exists against the person, an original or certified copy of the arrest warrant or the indictment; a statement of the criminal offense for which extradition is requested; and a description of the acts or omissions constituting the alleged offense, including an indication of the time and place of its commission;
 - (g) where the person has been convicted of an offense, a statement of the criminal offense for which extradition is requested and a description of the acts or omissions constituting the criminal offense; an original or certified copy of the judgment or any other document setting out the conviction and the penalty or order imposed; the fact that the penalty or order is enforceable; and the extent to which the penalty or order remains to be served;

- (h) where the person has been convicted of a criminal offense but no penalty has been imposed, a statement of the criminal offense for which extradition is requested; a description of the acts or omissions constituting the offense; and a document setting out the conviction and a statement affirming that there is an intention to impose the penalty or order; and
 - (i) a statement that the requesting state consents to the application of the rule of speciality under Article 317(1).
- 3. Requests for extradition and any documents supporting them must be in, or be accompanied by a translation into, an official language of [insert name of state], unless [insert name of state] exempts the requesting state from this obligation.
- 4. Where [insert name of state] considers that the information provided in support of a request for extradition is not sufficient, it may request that additional information be furnished within a specified reasonable time.
- 5. An extradition request must be transmitted from [the competent body for receiving requests for extradition] to the president of the courts in [insert name of state]. The president must convene a panel of judges to hear the request for extradition under Article 315.

Commentary

Paragraph 1: Paragraph 1 is based on Article 5 of the United Nations Model Treaty on Extradition, Article 10 of the Inter-American Convention on Extradition, Article 12 of the European Convention on Extradition, and Article 18 of the Economic Community of the West African States Convention on Extradition. It requires that an authority be designated to receive requests for extradition. In some states, a request is made through diplomatic channels, whereas in other states it is made to the ministry of justice, the court, or the office of the attorney general (or equivalent). A post-conflict state must determine the appropriate mechanism for receiving extradition requests based on its own criminal justice structure.

Paragraph 2: This paragraph is inspired by Section 16 of the United Nations Model Law on Extradition, Article 11 of the Inter-American Convention on Extradition, Article 18 of the Economic Community of West African States Convention on Extradition, Article 12 of the European Convention on Extradition, and Article 5 of the United Nations Model Treaty on Extradition, all of which contain specific requirements on the content of a request for extradition.

Paragraph 3: Paragraph 3 mirrors the language of Article 5(3) of the United Nations Model Treaty on Extradition.

Paragraph 4: This paragraph is based on Article 8 of the United Nations Model Treaty on Extradition, Article 13 of the European Convention on Extradition, Article 12 of the Inter-American Convention on Extradition, Article 19 of the Economic Community of West African States Convention on Extradition, and Section 19(2) of the United Nations Model Law on Extradition.

Paragraph 5: Reference should be made to Article 315. Given the necessity for collaboration between the designated competent authority for receiving requests for extradition and the court system, it would be advisable for these institutions to draft a joint standard operating procedure or memorandum of understanding.

Article 314: Instituting a Request for Provisional Arrest prior to a Request for Extradition

1. An application for the provisional arrest of a person prior to extradition may be made either directly to [insert name of state] or through the facilities of the International Criminal Police Organization (INTERPOL).
2. The competent authority for receiving requests for extradition may authorize a prosecutor to apply to the competent trial court for a provisional arrest warrant of that person pending the presentation of the extradition request where the court is satisfied that there are reasonable grounds to believe that:
 - (a) the person sought is ordinarily resident in [insert name of state], or is in or on his or her way or routinely travels to [insert name of state];
 - (b) the requesting state produced a valid arrest warrant against the person sought to be provisionally arrested; and
 - (c) the requesting state has undertaken to submit a request for the extradition of that person within [insert number] days.
3. The competent body for receiving requests for extradition may order the prosecutor to make an application for a provisional arrest warrant of the person sought where:
 - (a) a warrant for the person's arrest or an order of a similar nature has been issued or the person has been convicted in the foreign state; and
 - (b) it is necessary in the public interest to arrest that person, including to prevent him or her from escaping or committing a criminal offense.

4. The competent trial court may issue a provisional arrest warrant only where the conditions set out in Paragraphs 2 and 3 are met.
5. The provisional arrest warrant must order that the person be arrested and brought without delay before the competent trial court.
6. The provisional arrest warrant must also include:
 - (a) the name of the competent trial court;
 - (b) the name of the person to be arrested and any other identifying information;
 - (c) the name of the requesting state;
 - (d) a summary of the facts that are alleged to constitute a criminal offense and a specific reference to the criminal offense for which the arrest of the suspect is sought, including a reference to the relevant legal provisions;
 - (e) the authority authorized to execute the provisional arrest warrant;
 - (f) the date of the provisional arrest warrant; and
 - (g) the signature of the competent judge.
7. Where a provisional arrest warrant is sought, the trial court may order that the person subject to the warrant be detained or be subject to an order for bail or other restrictive measures.
8. The arrest warrant and any orders for detention or other restrictive measures must be cancelled where:
 - (a) a request for extradition has not been made within the period of time specified in Paragraph 2(c); or
 - (b) a request for extradition has been made but the competent trial court has not granted the request.
9. The release of the person subject to a provisional arrest warrant does not preclude the rearrest and institution of proceedings with a view to extraditing the person sought, if the request for extradition and supporting documents are subsequently received.

Commentary

Article 314 provides a mechanism to arrest a person whose extradition is being sought but where no formal request for extradition has yet been made under Article 313. Article 314 would be employed in urgent cases, for example, where there is a risk that the person who will be subject to the extradition request will flee. The requirement to provide a mechanism for provisional arrest is contained in Article 9 of the United Nations Model Treaty on Extradition, Article 22 of the Economic Community of West African States Convention on Extradition, Article 16 of the European Convention on Extradition.

tion, Article 14 of the Inter-American Convention on Extradition, and in other treaties such as the United Nations Convention against Transnational Organized Crime (Article 16[9]) and the United Nations Convention against Corruption (Article 44[10]). Article 314 is based on these conventions and on Section 20 of the United Nations Model Law on Extradition, which creates a framework for provisional arrest, and Article 9 of the United Nations Model Treaty on Extradition.

Article 315: Extradition Hearing

1. A request for extradition must be heard by a panel of three judges of the competent trial court.
2. The person whose extradition is sought must be present at the extradition hearing.
3. The person whose extradition is sought must be provided with legal assistance under Article 68.
4. The following conditions must be met for extradition to be granted:
 - (a) means for the identification of the accused or convicted person by an accurate description, photographs, fingerprints, or similar means of identification exist and the identity of the person has been established;
 - (b) a certificate or other reliable data about the nationality of the person whose extradition is sought exists;
 - (c) the criminal offense for which extradition is sought is punishable under the laws of the requesting state by a term of imprisonment exceeding one year;
 - (d) the conduct that constitutes the criminal offense would, if committed in [insert name of requesting state], constitute an offense that is punishable under the applicable law of [insert name of requesting state] by imprisonment for at least one year;
 - (e) extradition is sought for the enforcement of a penalty of imprisonment for which at least six months remains to be served or a more severe penalty remains to be carried out;
 - (f) the prosecution or execution of punishment is not barred by the statute of limitations in the requesting state;
 - (g) the person whose extradition is sought has not previously been finally convicted or acquitted of the offense in accordance with Article 8 of the MCC;

- (h) the extradition is not sought for a criminal offense for which the death penalty is prescribed, unless the requesting state provides written assurance that the death penalty will not be imposed or carried out;
 - (i) there are no substantial grounds for believing that the person whose extradition is sought will face torture or cruel, inhuman, or degrading treatment or punishment in the requesting state;
 - (j) there are no substantial grounds for believing that a request has been made for the purpose of prosecuting or punishing the person requested on account of his or her race, gender, national or ethnic origin, religion, political or ideological opinions, or membership in a particular social group;
 - (k) the act constitutes a criminal offense under domestic criminal law, except if the criminal offense is an internationally recognized criminal offense, including, but not limited to, genocide, crimes against humanity, war crimes, organized crime, trafficking in persons, migrant smuggling, money laundering, corruption, serious drugs offense, sale of children, child prostitution and child pornography, and terrorist offenses; and
 - (l) the person sought to be extradited will be protected by the guarantees contained in international human rights law.
5. Extradition may be refused where one or more of the following conditions are found to exist:
- (a) the person whose extradition is sought is a national of [insert name of state];
 - (b) the criminal offense for which the extradition is sought was committed, in whole or in part, in [insert name of state]; or
 - (c) a prosecution for the offense for which extradition is requested is pending in [insert name of state] against the person.
6. Extradition may not be refused solely on the ground that it involves fiscal matters.
7. Prior to refusal of a request for extradition, the requesting state must be given ample opportunity to provide information relevant to the state's allegation.
8. Where the conditions set out in Paragraph 4 are complied with, the competent trial court must order the extradition of the person concerned.
9. The trial court may, after ordering extradition, postpone the execution of the order, where the person sought is being tried or is serving a sentence in [insert name of state] for a criminal offense other than that for which the extradition is requested. The order may be postponed until the person is entitled to be set free by virtue of acquittal, completed sentence, or commutation

of sentence. No civil suit that the person may have pending against him or her in [insert name of state] may prevent or defer his or her surrender.

10. The trial court may, after ordering extradition, postpone the execution of the order where the surrender of the person sought would, for reasons of health, endanger his or her life; the surrender may be deferred until it would no longer pose such a danger.
11. The order of the competent trial court must be in writing and must contain:
 - (a) the name of the competent trial court and the identity of the authority that made the request;
 - (b) the identity, location, and nationality of the person whose extradition is sought;
 - (c) the location of the person to be extradited;
 - (d) the date on which the extradition order may be executed;
 - (e) the body authorized to execute the extradition order;
 - (f) the reasons for extradition, whether to prosecute the person in the requesting state or to serve a penalty already imposed on the person;
 - (g) the date of the order; and
 - (h) the signature of the judges of the panel of the competent trial court.
12. The order of the competent trial court granting extradition must be forwarded as soon as possible to the requesting state by the authority responsible for receiving requests for extradition in [insert name of state].
13. Where the competent trial court refuses to grant a request for extradition, it must prepare a written decision giving reasons for the refusal. The body responsible for receiving requests for extradition must forward the written decision to the requesting state.
14. Where the competent trial court orders the postponement of the execution of the order for extradition under Paragraph 9, it must prepare a written decision giving reasons for the refusal. The body responsible for receiving requests for extradition must forward the written decision to the requesting state.
15. Where a request for extradition is refused because:
 - (a) the person whose extradition is being sought is a national of [insert name of state];
 - (b) capital punishment is prescribed for the criminal offense that is the subject of the extradition request; or
 - (c) the criminal offense was committed in [insert name of state]

a prosecutor must be appointed to examine the evidence against the person sought relating to the criminal offense alleged in the request for extradition. The prosecutor must formally initiate an investigation under Article 94 where grounds exist.

16. The prosecutor or the person whose extradition was sought may appeal the decision of the trial court under Article 195.
17. If the appeals court finds under Article 315 that the prerequisites for extradition have been fulfilled, or where no interlocutory appeal has been filed under Article 295, the trial court must refer the matter of extradition to [head of the competent authority responsible for authorizing extradition], who must decide on the extradition.
18. The [head of the competent authority responsible for authorizing extradition] must render a ruling on whether the extradition request is granted or rejected. The ruling regarding extradition must be communicated to the requesting state through diplomatic channels.

Commentary

Once it is received by the competent authority, an extradition order must be passed on to the court system, whereupon a panel of three judges should be convened to hear the request for extradition. The panel of judges will determine the matter and will either grant or refuse the request for extradition. Where the request is refused, a written decision must be drafted that must then be transmitted to the requesting state via the competent authority responsible for authorizing extradition. The competent authority is responsible for making the final determination of whether or not extradition should be granted.

Paragraph 1: Under the MCCC, proceedings prior to a trial are usually conducted by a single judge. A panel of three judges is assigned for criminal offenses that carry a maximum penalty of greater than five years, as provided for under Article 6. Because of the complex nature of extradition proceedings and their sensitivity, the drafters of the MCCC incorporated a requirement that all extradition requests be heard by a panel of three judges rather than a single judge, even though the proceedings do not amount to a trial.

Paragraph 2: In accordance with the right to be present during a trial set out in Article 62, Paragraph 2 requires that the person who is the subject of a request for extradition be present during the hearing.

Paragraph 3: Reference should be made to Article 68 and its commentary.

Paragraph 4: Paragraph 4 contains the substantive and procedural grounds upon which extradition must be refused by the requested state. The competent trial court must ensure that none of the instances listed in this paragraph apply to the extradition request under consideration. If one or more grounds exist, extradition must be refused. Some international treaties on extradition contain grounds for refusal if the person has been granted amnesty or pardon relating to the criminal offense set out in the extradition request (see Article 3[e] of the United Nations Model Treaty on Extradition, Article 20 of the Inter-American Convention on Extradition, and Article 16 of the Economic Community of West African States Convention on Extradition). This ground has not been included in the MCCP, but a post-conflict state enacting legislation on extradition might consider adding it.

Another possible ground for refusal of a request for extradition that has not been included in the MCCP is the absence of evidence of a *prima facie* case that the person sought to be extradited committed the criminal offense. In some jurisdictions, the competent court examining the request for extradition goes into the substance and merits of the case in question and looks to see if there is evidence of guilt. This requirement has proven in practice to be a major impediment to extradition. It has also been found to undermine the need for simplicity of evidentiary requirements in extradition proceedings. For these reasons, the drafters of the MCCP adopted another approach that is favored by many states. Under this approach, the court dealing with the request for extradition abstains from examining the evidence of guilt against the person sought and relies instead on the existence of a valid arrest warrant from the requesting state (which should be provided under Article 315), in addition to ensuring that no grounds for refusal of extradition under the applicable law exist.

Paragraph 4(a): These paragraphs are inspired by Section 24 of the United Nations Model Law on Extradition, which requires that the competent trial court be satisfied that the person brought before the court is actually the person sought for extradition.

Paragraph 4(b): Although some states allow for the extradition of nationals, most states do not. In many states, the constitution prohibits the extradition of their nationals. The reticence of states to extradite their nationals is rooted in the concept of state sovereignty and, more precisely, the sovereignty of a state over a national who has committed a criminal offense. This exception to extradition is recognized in many international conventions, including the United Nations Convention against Transnational Organized Crime (Article 15[3]) and the United Nations Convention against Corruption (Article 42[3]). Article 6 of the European Convention on Extradition gives states parties the “right to refuse extradition of its nationals.” Under the MCCP, where a person is not extradited on the basis of his or her nationality, Article 318, Paragraph 15 requires that a prosecutor examine the evidence with a view to determining whether grounds exist to prosecute the person. Reference should be made to the commentary to Paragraph 15.

Paragraph 4(c)–(e): Under the MCCP, a person may be extradited for a criminal offense that carries a minimum penalty of one year’s imprisonment in the requesting state and one year’s minimum imprisonment in the requested state. Where extradition

is sought for the enforcement of a penalty of imprisonment, there must be at least six months remaining to be served. Paragraph 4(c)–(e) is inspired by Article 2 of the European Convention on Extradition, Article 3 of the Economic Community of West African States Convention on Extradition, and Article 3 of the Inter-American Convention on Extradition, although the latter two conventions provide that the criminal offense for which extradition is sought must carry a minimum penalty of two years. The United Nations Model Treaty on Extradition contains an option of either a one-year minimum or a two-year minimum. In general, all the treaties agree with the principle that, regarding extradition for the enforcement of a penalty, there must be at least six months remaining to be served.

Paragraph 4(f): This ground for refusal of extradition derives from Article 15 of the Economic Community of West African States Convention on Extradition, Article 10 of the European Convention on Extradition, Article 3(e) of the United Nations Model Treaty on Extradition, and Article 4(2) of the Inter-American Convention on Extradition.

Paragraph 4(g): Paragraph 4(g) is inspired by Article 9 of the European Convention on Extradition, Article 13 of the Economic Community of West African States Convention on Extradition, and Article 3(d) of the United Nations Model Treaty on Extradition.

Paragraph 4(h): This paragraph is inspired by Article 17 of the Economic Community of West African States Convention on Extradition, Article 11 of the European Convention on Extradition, Article 9 of the Inter-American Convention on Extradition, and Article 4(d) of the United Nations Model Treaty on Extradition.

Paragraph 4(i): This paragraph is derived from Article 3(f) of the United Nations Model Treaty on Extradition and Article 5 of the Economic Community of West African States Convention on Extradition. This ground is also a requirement of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 3).

Paragraph 4(j): The ground set out in Paragraph 4(j) derives from Article 3(b) of the United Nations Model Treaty on Extradition.

Paragraph 4(k): Under Paragraph 4(k), a request for extradition may be refused where the criminal offense in question is not also a criminal offense in the requested state. This is subject to the exception that a refusal may not be made where the criminal offense—although not recognized in the requesting state—is recognized internationally. Where the legal framework of the requested state does not provide for the offenses listed in Paragraph 4(k), given the serious nature of these offenses and their international recognition, this must not be used as an excuse to refuse extradition.

Paragraph 4(l): Paragraph 4(l) is inspired by Article 3(f) of the United Nations Model Treaty on Extradition and Article 5 of the Economic Community of West African

States Convention on Extradition. To ascertain the minimum guarantees contained in international human rights law, reference should be made to the various international human rights treaties (listed in the subsection “Legal Instruments” of Further Reading and Resources toward the end of the volume and incorporated into the MCC and the MCCP) and any case law that defines the nature and scope of the obligations contained in these treaties.

Paragraph 5(a): The practice as to whether a national may be extradited varies from state to state. Some states have constitutional guarantees against the extradition of nationals, whereas other states have no such prohibition. The divergence in practice is apparent in the international treaties on extradition. Some treaties, such as the European Convention on Extradition (Article 6), provide for refusal of extradition on the grounds of nationality, as does the United Nations Model Treaty on Extradition (Article 4). Conversely, the Inter-American Convention declares that the fact that a person sought is a national of the requesting state may not be invoked to decline a request for extradition (Article 7). Ultimately, a state enacting legislation on extradition will need to determine a policy on the extradition of nationals.

Paragraph 5(b): The discretionary ground for refusal of extradition contained in Paragraph 5(b) is inspired by Article 4(f) of the United Nations Model Treaty on Extradition, Article 7 of the European Convention on Extradition, and Article 11 of the Economic Community of West African States Convention on Extradition.

Paragraph 5(c): Paragraph 5(c) is inspired by Article 12 of the Economic Community of West African States Convention on Extradition, Article 8 of the European Convention on Extradition, and Article 4(c) of the United Nations Model Treaty on Extradition.

Paragraph 6: A number of international treaties on extradition (or other treaties that deal indirectly with extradition) require that extradition not be refused purely on the basis that the request concerns fiscal matters, for example, Article 5 of the European Convention on Extradition, Article 9 of the Economic Community of West African States Convention on Extradition, Article 2(3) of the United Nations Model Treaty on Extradition, Article 16(15) of the United Nations Convention against Transnational Organized Crime, and Article 44(16) of the United Nations Convention against Corruption. Paragraph 5 duplicates the substance of these provisions.

Paragraphs 7 and 8: These paragraphs are derived from Article 20 of the Inter-American Convention on Extradition, Article 19 of the European Convention on Extradition, and Article 25 of the Economic Community of West African States Convention on Extradition.

Paragraphs 12–14: Article 10 of the United Nations Model Treaty on Extradition requires that the requested state promptly communicate its decision on the extradition request to the requesting state. Article 10(2) also provides that the requested state give reasons for any complete or partial refusal of the request. The same requirement is

contained in Article 18 of the European Convention on Extradition and Article 17 of the Inter-American Convention on Extradition. On the basis of these requirements, Paragraphs 12–14 require that the decision on extradition be immediately communicated by the authority responsible for receiving requests for extradition and that the trial court prepare a written decision on its refusal to grant an extradition order.

Paragraph 15: Under Paragraph 15, a request for extradition may be refused where the person sought is a national of the requested state, where the person may face capital punishment in the requesting state, or where the criminal offense was committed in the requested state. Where extradition is refused on these grounds, the various international conventions on extradition require that the person who was sought be investigated for the criminal offense alleged by the requesting state. For example, Article 6 of the European Convention on Extradition and Article 16(12) of the United Nations Convention against Transnational Organized Crime require that if the extradition of a national is refused, the case be submitted to the authorities in order that proceedings be undertaken if they are considered appropriate. Article 8 of the Inter-American Convention on Extradition, which applies to all grounds on which a request for extradition is based and not just refusal on the basis of nationality, requires that a state that does not deliver the person sought is obliged (where its law permits) to prosecute the person for the offense for which he or she is charged “just as if it had been committed within its territory, and shall inform the requesting state of the judgment handed down.” Under the MCCP, the list of grounds for refusal that trigger the requirement to prosecute is more limited. It is important to take into account the fact that the requesting state must have jurisdiction over both the person and the criminal offense for it to mount a prosecution. If the offense that was the subject of the extradition order was committed outside the territory of the requested state, sufficient grounds of extra-territorial or universal jurisdiction would be required to legally prosecute the accused person. Reference should be made to Articles 5 and 6 of the MCC, which address extra-territorial jurisdiction and universal jurisdiction, respectively.

Paragraph 17: Under most legal systems, the courts do not have the final say on matters of extradition. Once the court has determined the matter of extradition in accordance with the applicable law on extradition, it is incumbent upon the court to refer the matter to another authority. In many states, the minister for justice makes the final decision on extradition. In others, the minister for the state or minister for foreign affairs is ultimately responsible for confirming a court’s determination on the propriety of an individual extradition request. The term “head of the competent authority responsible for authorizing extradition” is used to signify the person responsible for making the final determination on extradition. The title of the relevant person should be inserted in this paragraph.

Article 316: Surrender to a Requesting State

1. Where the [head of the competent authority responsible for authorizing extradition] approves the extradition, and upon the expiration of the period for filing an interlocutory appeal under Article 295, the competent trial court must ensure that the request for extradition is executed.
2. The requesting state and [insert name of state] must, without undue delay, arrange for the surrender of the person sought.
3. The competent trial court may order the detention of the person sought pending surrender.
4. [Insert name of state] must inform the requesting state of the length of time the person sought was detained with a view to surrender.
5. The person being extradited must be removed from [insert name of state] within such reasonable period as [insert name of state] specifies and, if the person is not removed within that period, [insert name of state] may release the person and may refuse to extradite that person.
6. In exigent circumstances, where the delay in removing the person to be extradited is due to circumstances beyond the control of the requesting state, the competent trial court may extend the period of detention.
7. The surrender of a person sought to the agents of the requesting state must be carried out at a place determined by [insert name of state]. This place must, if possible, be an airport from which direct international flights depart for the requesting state.

Commentary

Article 316 lays down the fundamentals of the procedure for surrendering a person to a state that has requested his or her extradition. This article is inspired by Article 11 of the United Nations Model Treaty on Extradition, Articles 24 and 25 of the Economic Community of West African States Convention on Extradition, Articles 18 and 19 of the European Convention on Extradition, and Articles 19, 20, and 22 of the Inter-American Convention on Extradition. Once an extradition order has been made, both the requesting and the requested state must agree upon a surrender time and place. Where the surrender is not immediate, the competent trial court may order the detention of the person to be extradited pending the surrender. Under Paragraph 4, the requesting state must place a limit on the time that the person to be extradited can be

held without being surrendered. Once this time limit has passed, the requesting state may refuse to extradite the person and may let the person go free. In the Inter-American Convention on Extradition, the time limit for surrender is thirty days, subject to extension in exigent circumstances. In the European Convention on Extradition, Article 18 provides that a person who has not been surrendered after fifteen days may be released at the discretion of the requested state and must be released after thirty days except in the case of circumstances beyond the control of the requesting state.

Article 317: Rule of Speciality

1. A person extradited to a requesting state must not be proceeded against, sentenced, detained, re-extradited to a third state, or subjected to any other restrictions of personal liberty in the territory of the requesting state for any criminal offense committed before the extradition other than:
 - (a) a criminal offense for which extradition is granted; or
 - (b) any other offense in respect of which [insert name of state] consents.
2. A request for the consent of [insert name of state] under Paragraph 1(b) must be accompanied by the materials required under Article 313 and a legal record of any statement made by the extradited person with respect to the criminal offense.
3. Paragraph 1 does not apply where:
 - (a) the extradited person has had the opportunity to leave the requesting state and has not done so within forty-five days of final discharge in respect of the criminal offense for which he or she was extradited; or
 - (b) the person has voluntarily returned to the territory of the requesting state after leaving it.

Commentary

According to the *Revised Manual on the Model Treaty on Extradition* and the *Model Treaty on Mutual Assistance in Criminal Matters* (page 52), the rule of speciality limits the power that the requesting state has over the person surrendered once a request for extradition has been granted. The generally accepted international principle of speciality is set out in Article 14 of the United Nations Model Treaty on Extradition, Article 14 of the European Convention on Extradition, Article 20 of the Economic Community of West African States Convention on Extradition, and Article 13 of the Inter-American Convention on Extradition.

Article 318: Concurrent Requests

1. Where several states request the extradition of the same person for the same criminal offense, priority must be given to the state of which the person is a national.
2. Where the person's state of nationality does not request extradition, priority must be given to the state in whose territory the criminal offense was committed.
3. Where the person's state of nationality does not request extradition and the criminal offense has been committed in the territory of several states or where the site of commission is not known, priority must be given to the state that requested extradition first.

Commentary

Article 318 covers the situation where more than one state makes a request for extradition of the same person. Article 318 is based on Article 16 of the United Nations Model Treaty on Extradition, Article 23 of the Economic Community of West African States Convention on Extradition, Article 17 of the European Convention on Extradition, and Article 15 of the Inter-American Convention on Extradition.

Article 319: Costs of Extradition

1. [Insert name of state] must meet the costs of any proceedings arising out of a request for extradition.
2. [Insert name of state] must meet the costs incurred in the arrest and detention of the person to be surrendered.
3. The requesting state must meet the costs incurred in conveying the person from [insert name of state] to the requesting state, including all transit costs and the costs of any translations.

Commentary

The ordinarily accepted rule relating to the costs of extradition is that the requested state bears the costs of any proceedings arising from the request and the cost of arrest and detention. Any other expenses, such as transit costs, are the financial responsibility of the requesting state. Article 319 is based on Article 17 of the United Nations Model Treaty on Extradition, Article 24 of the European Convention on Extradition, Article 30 of the Economic Community of West African States Convention on Extradition, Article 25 of the Inter-American Convention on Extradition, and Section 41 of the United Nations Model Law on Extradition. Reference should be made to the United Nations *Model Treaty on Extradition* for discussion of additional issues relating to the costs of extradition such as whether legal representation of the requested person should be borne by the requesting state. In relation to the M CCP, Article 68 requires that a person who is subject to an extradition request receive legal assistance and that the costs of this assistance be borne by the requesting state.

Article 320: Requests for Extradition from a Foreign State

1. Where an arrest warrant or indictment has been filed or a judgment has been rendered against a person who resides in a foreign state, [insert name of state] may file a request for his or her extradition from the foreign state.
2. The request for extradition must be sent to a foreign state through [the competent authority for submitting extradition requests] in [insert name of state].
3. A request for extradition must be accompanied by the documents and information set out in Article 313.

Commentary

This article applies to a situation where the state is requesting, rather than being requested for, extradition. It provides the preliminary procedure for requesting extradition. Because the determination of the extradition request will take place in another state (the foreign state) and the applicable law will be the law of that state, the M CCP could regulate only how the request for extradition is filed with the authority that will then transmit the request to the competent authorities in the requested state. The authority designated with sending the request should be the same authority designated to receive requests for extradition under Article 313.

Chapter 15: Juvenile Justice

General Commentary

The term *juvenile* is defined in Article 1(26) of the MCCP as being a child between the ages of twelve and eighteen years. Under Article 7(4) of the MCC, the courts may assert criminal jurisdiction over juvenile persons where the persons are suspected of committing a criminal offense. Chapter 15 addresses the treatment of juvenile persons who come into contact with the criminal justice system, whether as suspects, accused persons, or convicted persons. Juveniles are also classified as children under the definition of child set out in Article 1 of the United Nations Convention on the Rights of the Child and are therefore entitled to the protections afforded to children under the international human rights legal framework.

Juveniles enjoy at least the same guarantees and protection as adults do in criminal proceedings (see United Nations Human Rights Committee, General Comment no. 13, paragraph 16). On account of their vulnerable status, juveniles are afforded additional protections provided by specialized international instruments that deal exclusively with the rights of the child. These rights address the unique needs of a juvenile and enhance the protection available to an individual who “by reason of [his or her] physical and mental immaturity, needs special safeguards and care, including appropriate legal protection” (see United Nations Declaration on the Rights of the Child, Preamble, paragraph 3; and United Nations Convention on the Rights of the Child, Preamble, paragraph 10).

The protective framework aimed at safeguarding juvenile rights consists of the United Nations Convention on the Rights of the Child and the United Nations African Charter on the Rights and Welfare of the Child and a number of nonbinding instruments. The nonbinding instruments—the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the United Nations Guidelines for the Protection of Juveniles Deprived of Their Liberty, and the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines)—specifically address the issue of the administration of justice for juveniles.

Many of the rights articulated in these instruments are common to both adults and juveniles: (a) freedom from torture and cruel, inhuman, or degrading treatment (United Nations Convention on the Rights of the Child, Article 37[a]; African Charter on the Rights and Welfare of the Child Article 17[2][a]); (b) presumption of innocence (United Nations Convention on the Rights of the Child, Article 40[2][b][i]; African Charter on the Rights and Welfare of the Child, Article 17[2][c][i]); (c) freedom from retroactive prosecution (United Nations Convention on the Rights of the Child, Article 40[2][a]); (d) freedom from unlawful or arbitrary deprivation of liberty (United Nations Convention on the Rights of the Child, Article 37[b]); (e) right to counsel (United Nations Convention on the Rights of the Child, Article 37[d]; African Charter on the Rights and Welfare of the Child, Article 17[2][c][iii]); (f) right to an interpreter (United Nations Convention on the Rights of the Child, Article 40[2][b][vi]; African

Charter on the Rights and Welfare of the Child, Article 17[2][c][ii]); (g) right to be informed of the charges against him or her (United Nations Convention on the Rights of the Child, Article 40[2][b][ii]; African Charter on the Rights and Welfare of the Child, Article 17[2][c][ii]); (h) right to challenge to lawfulness of the deprivation of his or her liberty (United Nations Convention on the Rights of the Child, Article 37[d]); (i) right to freedom from compulsion to testify or confess guilt (United Nations Convention on the Rights of the Child, Article 40[2][b][iv]); (j) right to trial without undue delay (United Nations Standard Minimum Rules for the Administration of Juvenile Justice [Beijing Rules], Rule 20; American Convention on Human Rights, Article 5[5]; African Charter on the Rights and Welfare of the Child, Article 17[2][c][iv]); (k) right to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses (United Nations Convention on the Rights of the Child, Article 40[2][b][v]); (l) right to have any decisions reviewed by a higher authority (United Nations Convention on the Rights of the Child, Article 40[2][b][v]; African Charter on the Rights and Welfare of the Child, Article 17[c][iv]); and (m) right to a competent, independent, and impartial tribunal (United Nations Convention on the Rights of the Child, Article 40[2][b][iii]; African Charter on the Rights and Welfare of the Child, Article 17[2][c][iv]). These rights are protected in general terms for both adults and juveniles throughout the MCC and the MCCP.

Chapter 15 contains supplementary rights that are applicable to juveniles. These rights are not common to adults and are not contained elsewhere in the MCCP. The drafters decided that it was better to create a separate section cataloging all the rights applicable to juveniles rather than disbursing them throughout the MCCP.

Part 1: Applicability of the MCCP to Juveniles

Article 321: Provisions Applicable to Juveniles

Except as otherwise provided for in Chapter 15, all the provisions of the MCCP apply to juveniles in the same manner that they apply to adults.

Commentary

As mentioned in the general commentary to Chapter 15, in the determination of criminal charges against a juvenile, that person is entitled to not only the protections provided to adults under the MCCP but also additional protections. These extra protective measures are set out in Chapter 15. Article 321 clarifies that, subject to the specifications of Chapter 15, the protections afforded to and procedures relevant to adults apply to juveniles.

Part 2: Special Panels for Juveniles

Article 322: Composition and Duties of Special Panels for Juveniles

1. The president of the courts must compose a special panel for juveniles in each trial court and the appeals court in [insert name of state].
2. The duty of the special panel for juveniles is to hear all matters in cases in which the suspect or the accused is a juvenile.
3. The special panel for juveniles must be composed of three judges with adequate expertise, experience, or training in criminal matters involving juveniles.
4. The judges of the panel may sit individually or collectively in accordance with the provisions of the MCCP.

Commentary

Paragraphs 1–3: Article 322 provides for the designation of a special panel of judges to deal with juvenile cases in each trial court and the appeals court. All matters relating to juveniles must be heard only before such panels. This special panel mechanism is distinct from a special juvenile court. The juvenile panel was inserted as a compromise solution between experts who thought that a fragile and often resource-poor post-conflict state could not sustain a separate system of criminal justice for juveniles (and consequently such a model should not be included in the Model Codes) and experts who argued that the Model Codes should advocate the establishment of a juvenile justice system. In an ideal world, separate juvenile courts would be established in a post-conflict state. International standards do not require the establishment of a separate juvenile justice system; however, “[t]here is nonetheless a more or less implicit presumption that something so different as to warrant the name ‘juvenile justice system’ is necessary in order to comply with current norms” (see UNICEF, *Innocenti Digest: Juvenile Justice*, page 10). A post-conflict state should seek to move to such a system, but in the interim, a good solution is to designate a certain number of judges within each trial court and appeals court to deal with juvenile cases. These judges should have expertise in juvenile justice and significant training and experience in the relevant international and domestic human rights standards and best practices in dealing with juveniles caught up in the criminal justice system.

Paragraph 4: Whether the judges who make up a special panel sit together or individually will depend on the other provisions of the MCCP. For example, a single juvenile judge at the trial court level might hear a case where the potential penalty is less than five years' imprisonment (see Article 6[2]), and a single judge might hear an application for habeas corpus under Articles 339–345. A panel of judges must hear a case where a juvenile is charged with an offense that carries a potential penalty greater than five years (see Article 6[3]).

Part 3: Jurisdiction over Children and Juveniles

Article 323: Jurisdiction over Children and Juveniles

1. In accordance with Article 7(3) of the MCC, a child under the age of twelve years must not be prosecuted or tried for a criminal offense.
2. In accordance with Article 7(4) of the MCC, a juvenile may be prosecuted and tried for a criminal offense.
3. The investigation, prosecution, trial, and appeal of a case involving a juvenile must be conducted in full compliance with Chapter 15 of the M CCP.
4. The imposition of dispositions on a juvenile, or a person who committed a criminal offense when he or she was a juvenile, must be conducted in full compliance with Section 14 of Part I: General Part of the MCC.

Commentary

Paragraph 4: Section 14 of the General Part of the MCC establishes a wholly separate mechanism for dispositions for juveniles found to be criminally responsible. The term *dispositions* is used with regard to juveniles in the same way that *penalty* is used with regard to adults. When a juvenile person is found criminally responsible for a criminal offense, the judge or panel of judges must follow the rules and procedures set out in Section 14 for imposing a suitable disposition.

Article 324: Determination of the Age of a Child or Juvenile

1. The age of a person is determined at the time at which the criminal offense was alleged to have been committed.
2. Where possible, proof of the age of the suspect or the accused must be obtained from a civil registration document recognized in [insert name of state].

3. Age must be determined by other means, such as by medical expertise, where:
 - (a) the civil registration document is suspect or devoid of probative value;
 - (b) there is no civil registration document; or
 - (c) the person is not registered in [insert name of state] but in another state and registration documents cannot be obtained.
4. Where age is determined by other means, age is then a question of fact to be determined by the competent judge or panel of judges.

Commentary

The determination of the age of a person is relevant to whether a court has personal jurisdiction over that person in accordance with Article 7 of the MCC.

In some states, official birth records or identification cards make it easy to determine the age of a person. Other states, and frequently post-conflict states, do not have a fully functional mechanism for the creation of birth records or identification cards, or birth records may have been destroyed during the conflict. An additional difficulty lies in the practice of delayed birth registration (e.g., waiting to register the birth of a child along with children born later). A child may thus have a “real” and an “official” birthday, which can lead to confusion in determining the actual age of the person.

Where no official civil registration document is available, where the authenticity of the civil document is in doubt, or where the person was never registered, the approximate age of a person may be determined by medical examination by a doctor. The judge or panel of judges may accept or reject the medical determination of age as a question of fact.

Part 4: Aim of Juvenile Justice and Applicable Principles

Article 325: Aim of Juvenile Justice

The juvenile justice system must emphasize the well-being of the juvenile and must ensure that any reaction to juvenile persons must always be in proportion to the circumstances of both the juvenile and the criminal offense.

Commentary

Article 325 is derived from Rule 5 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. The official commentary to this rule states that the rule contains two important objectives: first, the idea that the promotion of the well-being of the juvenile should be at the heart of criminal justice, meaning that merely punitive sanctions against a juvenile should be avoided; and second, the “principle of proportionality.” The commentary notes that the individual circumstances of the juvenile, including social status, family situation, harm caused by the offense, and other factors affecting personal circumstances, should influence the proportionality of the reactions of the criminal justice system to the juvenile. The rule “calls for no less and no more than a fair reaction in any given case.”

Article 326: Principles Applicable to Juvenile Justice

1. A juvenile must be treated in a manner consistent with the promotion of his or her sense of dignity and worth that reinforces the juvenile’s respect for the human rights and fundamental freedoms of others and that takes into account the juvenile’s age and the desirability of promoting his or her rehabilitation, reintegration, and assumption of a constructive role in society.
2. In all actions concerning children taken by the court, the best interests of the child must be the primary consideration.

3. At all stages of the proceedings, the juvenile's right to privacy must be respected to avoid harm being caused to him or her by undue publicity or by the process of labeling. In principle, no information that may lead to the identification of a juvenile may be published.
4. A case concerning a juvenile must be handled expeditiously and without any unnecessary delay.

Commentary

Paragraph 1: The wording of Paragraph 1 is taken directly from Article 40(1) of the United Nations Convention on the Rights of the Child. This wording is echoed in Article 14(4) of the International Covenant on Civil and Political Rights, which states that “in the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation,” and in Article 17(1) of the African Charter on the Rights and Welfare of the Child, which states that “every child . . . shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.” The principle outlined in Paragraph 1 is a general principle, like the rest of the principles in Article 326, that applies throughout the proceedings from investigation to trial and appeal. These principles should be taken into account by all criminal justice actors (police, prosecution, defense, and judiciary).

Paragraph 2: The “best interests” test derives from Article 3(1) of the United Nations Convention on the Rights of the Child, which requires that in all actions concerning children by public or private institutions, including courts of law, “the best interests of the child shall be a primary consideration.” Article 4(1) of the African Charter on the Rights and Welfare of the Child provides that the best interests test is “the primary consideration.”

Paragraph 3: Under Article 40(2)(b)(vii) of the United Nations Convention on the Rights of the Child and Rule 8 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the right to privacy of the juvenile is acknowledged and an obligation is created to ensure that he or she is not harmed by undue publicity or by being labeled. The official commentary to the Standard Minimum Rules notes that juveniles are particularly susceptible to stigmatization and that this labeling can result in the permanent identification of a juvenile as a delinquent or a criminal. It further states that the purpose of this principle is to protect the juvenile from any adverse affect from the publication in the mass media of information about the case such as the name of the juvenile.

The need to ensure the privacy of juveniles is given effect in Article 62, which provides that the public and the press may be excluded from proceedings “where the interests of the child so require.” Article 62(3) also states that in the case of a juvenile, a judgment may be pronounced otherwise than in public. These requirements are

reiterated in Article 326, which requires that all proceedings relating to juveniles be held in closed session, allows the judgment in the case to be delivered in private, and requires that publicity and reporting on a case be restricted. Article 326 obliges the court to seal and store records of juvenile proceedings separately and under lock and provides for limitations on access to this information to further secure the right to privacy of the juvenile.

Paragraph 4: Article 63 of the MCCP provides for the right to trial without undue delay and a trial within a reasonable time or release where a person is detained. These rights apply to both adults and juveniles. In the case of juveniles, international standards provide an extra element of urgency in expediting criminal proceedings. The wording of Paragraph 4 comes from Rule 20 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. The official commentary to the rule states that the speedy conduct of juvenile proceedings is of paramount concern. It notes that, as time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offense, both intellectually and psychologically.

Part 5: Juvenile Diversion Programs

Article 327: Juvenile Diversion Programs

The competent legislative authority in [insert name of state] must establish juvenile diversion programs.

Commentary

Article 327 requires that the competent legislative authority establish programs that divert juveniles from the criminal justice system. Diversion involves the removal of the juvenile from the criminal justice process and frequently means redirection to community support services. This is done either formally or informally, depending on the state in question (see the commentary to Rule 11 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice). According to UNICEF, *Innocenti Digest: Juvenile Justice*, more countries are attempting to find constructive ways of avoiding contact between a child or young person and the justice system “unnecessarily.” Diversion is regularly used in the case of first-time offenders or minor criminal offenses. It may be undertaken by the police, the prosecution, or the courts. Several different diversion models may be employed; for example, a juvenile may be diverted by police after police consultation with the juvenile’s family and social worker or after a formal meeting between a court representative and the juvenile. Diversion may also be controlled by the prosecutor, who may choose not to initiate an investigation where the juvenile is a first-time offender or where the offense is not of a serious nature. The juvenile may be required to undergo counseling or “life skills” courses, or the prosecutor may require that the juvenile be supervised by a responsible person. Juveniles may also be required to attend “children’s hearings” (a children’s hearing is a non-court-hearing that takes place in an informal and less adversarial setting, with a panel of laypersons deciding upon a disposition based on discussion with the juvenile, his or her family, teachers, and social workers) or be subject to welfare measures (*Innocenti Digest*, pages 10–11).

The Juvenile Justice Code of post-conflict Kosovo was enacted in 2004. It integrated a variety of court-imposed diversion measures such as mediation between the juvenile and the victim of the crime, mediation between the juvenile and his or her family, the payment of compensation, the requirement of regular school attendance, employment or other professional training, the performance of unpaid community service work, education in traffic regulations, and psychological counseling (Article 15). Before deciding on the suitability of a diversion measure, the court must ensure that the juvenile committed only a minor offense, that the juvenile has accepted responsibility for his or her action and is ready to make peace with the victim, and that

the juvenile has consented to diversion (Article 14). The element of consent is vital to the overall operation of diversion measures as required under Rule 11.3 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

The MCCP does not lay down specific diversion measures, nor does it lay out a process for their determination. There is a huge variety of diversion measures; their acceptance and potential for implementation will be context specific. It is incumbent on each state to decide which diversion measures to incorporate and how to incorporate them into law. A separate piece of legislation may be required. The issue of juvenile diversion measures should be broadly discussed within the community, and care should be given to implementing measures that are generally supported by the community, because many diversion measures require community involvement to work effectively. In some cases, authorities may choose to work with civil society or non-governmental organizations on the implementation and operation of diversion measures. This kind of cooperation has worked effectively in many states and lightens the financial burden on the state.

Part 6: Investigation, Arrest, and Detention of a Juvenile

Article 328: Contact with the Police and the Prosecutor

Contacts between the police and prosecutor and a juvenile must be managed in such a way as to respect the legal status of the juvenile, promote his or her well-being, and avoid harm to him or her, with due regard for the circumstances of the case.

Commentary

The wording of Article 328 is taken from Rule 10(3) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. The official commentary to Rule 10(3) states that “avoid harm” is a flexible term that covers many features of possible interaction (e.g., the use of harsh language, physical violence, or exposure to the environment). This term should be broadly interpreted as doing the least harm possible to the juvenile. According to the commentary, “compassion and kind firmness are important in these situations.”

The concept of avoiding harm should be integrated into police training and practice and also into any secondary legislation that governs police policies and procedures such as standard operating procedures or implementing regulations. Police officers need to be adequately trained on the law surrounding the treatment of juveniles and also on how to properly interact with juvenile suspects and accused persons. Specific procedures should be established to give effect to the rights of the juvenile as defined in international human rights law and the MCCP and other criminal procedure laws.

Article 329: Questioning of a Juvenile

1. The conditions set out in Articles 106–109 apply to the questioning of a juvenile.
2. In addition, the questioning of a juvenile must always be conducted in the presence of counsel for the juvenile and a responsible person.

3. A “responsible person” means the juvenile’s parents, legal guardian, or closest relative, in that order, or, if none of the above is available, a social worker or representative of a responsible organization.

Commentary

A juvenile being questioned is vulnerable to pressure, coercion, and possibly torture or other mistreatment. According to UNICEF, *Innocenti Digest: Juvenile Justice*, juvenile girls are particularly vulnerable to sexual harassment and abuse during questioning. It is therefore vital that special attention be paid to the circumstances and safeguards surrounding the questioning of a juvenile.

The regular safeguards contained in Articles 106–109 apply equally to adults and juveniles. In addition, Article 329 requires that a juvenile be questioned only in the presence of his or her counsel and a responsible person. The responsible person will most likely be a family member; however, if a family member is not available or if the court determines that it is not in the best interests of the juvenile for the family member to be present, the responsible person may be a social worker or a representative of an international or national organization, for example, a non-governmental organization that deals with children’s rights. The presence of counsel and a responsible person ensures effective oversight over the conduct of those interviewing the juvenile, and it provides the juvenile with reassurance and eases the potential trauma of a police interview.

In a post-conflict state where there is a shortage of trained lawyers, a paralegal may take the place of a lawyer and may therefore be present during the questioning of a juvenile instead of counsel. Reference should be made to Article 52 and its commentary.

Article 330: Warrants and Orders against a Juvenile

Warrants and orders against juveniles may be issued only by a competent judge of the competent special panel for juveniles.

Commentary

In light of Article 322(2), which requires that a member of the special panel for juveniles hear all matters in cases concerning juveniles, Article 330 provides that any warrants and orders that are requested by the prosecutor or the defense be heard by a competent judge from the special panel for juveniles.

Article 331: Physical Examination of a Juvenile

1. A juvenile may not consent to a physical examination.
2. A warrant for a physical examination of a juvenile under Article 142 must be issued only after careful consideration and where it is absolutely necessary.
3. In addition to the conditions for the execution of a warrant for a physical examination under Article 142, in the case of juveniles, a responsible person must be present during the physical examination. A responsible person has the same meaning as under Article 329(3).

Commentary

Paragraph 1: A warrant is usually required to conduct a physical examination of a person, except in certain circumstances outlined in the MCCP. A physical examination under Article 142(3) may be conducted without a warrant where the person consents or where other grounds exist. In the case of a juvenile who comes into contact with the police, the juvenile may be frightened or intimidated by the police. The juvenile may thus be unable to give a truly informed consent and may believe that he or she has no choice but to consent. For this reason, Paragraph 1 precludes the police from seeking consent from a juvenile to justify a physical examination.

Paragraph 2: A physical examination can be quite intrusive and may be an intimidating experience for a vulnerable juvenile. In line with the best interests criterion laid out in Article 326(2) and the minimization of harm principle in Article 328, physical examinations of juveniles should be avoided except where they are absolutely necessary. In considering the grounds for a warrant, the competent judge or a police officer who may have the grounds to conduct a physical examination without a warrant under Article 142 must consider the need to do so carefully before sanctioning a search or examination.

Paragraph 3: Where a physical examination is absolutely necessary, a responsible person, who may be a family member or legal guardian, a social worker, or a representative of a competent organization, should be present as the guardian of the juvenile and his or her well-being and to ensure that the juvenile is treated appropriately during the examination.

Article 332: Arrest of a Juvenile

1. A juvenile may be arrested only as a measure of last resort and for the shortest appropriate period of time.
2. Upon arrest of a juvenile, a responsible person must be notified of the arrest within the shortest possible time. The responsible person has the same meaning as under Article 329(3).
3. Upon arrest, a juvenile must be provided with free legal assistance under Article 68, where the juvenile does not have counsel of his or her own choosing.
4. In accordance with Article 69, a juvenile may not waive his or her right to counsel.

Commentary

Paragraph 1: Paragraph 1 derives its wording from Article 37(b) of the United Nations Convention on the Rights of the Child.

Paragraph 2: Rule 10 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice provides that upon the apprehension of a juvenile, his or her parents or guardian must be immediately notified. Principle 16(3) of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment reiterates this obligation. Paragraph 2 gives effect to these obligations. It uses the term “responsible person,” which includes parents, legal guardians, other family members, and alternatively a social worker or representative of a responsible organization.

Paragraph 3: It is imperative that a juvenile have legal assistance because a juvenile will be unable to effectively defend himself or herself. Article 40(2)(b)(ii) of the United Nations Convention on the Rights of the Child requires that a child have legal or other appropriate assistance in the preparation and presentation of his or her defense. Article 37 provides that a child have prompt access to legal or other appropriate assistance. Rule 18(a) of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty requires that juveniles have the right to free legal assistance where such aid is available. Where a child does not have a lawyer, Article 68 of the MCCP requires that mandatory legal assistance be given to the juvenile.

Paragraph 4: It is clearly in the best interests of the juvenile to have legal assistance. An adult may waive his or her right to legal assistance under Article 69 of the MCCP. An adult is more likely to be able to make an informed decision and is less susceptible to pressure. A juvenile may not fully understand the implications of waiving his or her right or may bow more easily to pressure to sign a statement to waive his or her right. For these reasons, Article 69 precludes the possibility of obtaining a signed waiver of legal assistance from a juvenile.

Article 333: Review of Arrest of a Juvenile

1. Special efforts must be made to ensure that juvenile arrested persons are brought as quickly as possible before the competent judge under Article 175.
2. Counsel for the juvenile and a responsible person must be present during the hearing. A responsible person has the same meaning as under Article 329(3).
3. The initial hearing under Article 175 must be heard in closed sessions.

Commentary

Paragraph 1: Articles 170(5) and 171(6) require that a person, either an adult or a juvenile, be brought promptly before a judge and no later than seventy-two hours after arrest. Seventy-two hours is the maximum allowable time frame under the MCCP. In the case of a juvenile arrested person, Article 333 provides that the authorities must make extra efforts to bring the juvenile before the judge sooner than the seventy-two hour period.

Paragraph 2: This paragraph stems from Rule 15 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.

Article 334: Detention of a Juvenile

1. A juvenile may be detained only as a measure of last resort and for the shortest appropriate period of time.
2. Counsel for the juvenile and a responsible person must be present during any detention hearing or hearing on continued detention. A responsible person has the same meaning as under Article 329(3).
3. Detention hearings under Articles 175 and 188 must be heard in closed sessions.
4. No extension of the time limits of detention as set out in Article 190 may be granted with respect to a juvenile. Where the time limit of detention prescribed in Article 189 has expired, the juvenile must be released pending trial.

5. The applicable provisions of the Model Detention Act govern the detention of juveniles.

Commentary

Paragraph 1: Paragraph 1 derives its wording from Article 37(b) of the United Nations Convention on the Rights of the Child, which states that detention of a juvenile shall be a measure of last resort and only for the shortest possible time. This wording is repeated in Rule 17 of the United Nations Rules for the Protection of Juveniles Deprived of Their Liberty and Rule 13 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. The commentary to Rule 13 talks about the danger of “criminal contamination” when juveniles are held in detention pending trial. Juveniles who are detained may also become liable to violation of other rights, particularly where the detention centers are substandard or resource starved, as is often true in a post-conflict state. The competent judge considering whether to detain a juvenile must carefully consider the principle contained in Paragraph 1, as must the prosecutor in considering whether to lodge a motion for detention or continued detention.

Paragraph 2: Reference should be made to the commentary accompanying Article 329.

Paragraph 4: In order to give effect to the general principle set forth in Paragraph 1, Paragraph 5 precludes the extension of the maximum period of detention under Article 189 in the case of juvenile detainees. The time limits set out in Article 189 must be adhered to. Where a juvenile is detained beyond these time limits, he or she must be released pending trial. This gives effect to the juvenile’s right to trial within a reasonable time or release, which is contained in Article 63.

Paragraph 5: Reference should be made to the Model Detention Act.

Part 7: Indictment, Trial, and Appeal Proceedings

Article 335: Proceedings in Court

1. A juvenile suspect or accused has the right to have counsel and a responsible person present during any hearing.
2. All hearings and all indictment, trial, and appeal proceedings must be heard in closed session.
3. The publicity of hearings and indictment, trial, and appeal proceedings must be restricted by an order of the special panel for juveniles made at each session.
4. The identity of the juvenile must not be revealed to the public, particularly in newspapers or on the radio or television, by an order of the special panel for juveniles at each session of the panel.
5. The judgment may be delivered in public, except where the interests of the juvenile require otherwise.

Commentary

Paragraph 1: Just as in the case of a hearing under Article 333(2), the juvenile has the right to have counsel for the juvenile and a responsible person must be present during any hearing in the criminal proceedings.

Paragraph 2: All hearings, including the confirmation of indictment, the trial, and any appeals, must be held in closed session. Reference should be made to Article 326(3), which discusses the need to protect the privacy of juveniles to forestall any potential stigmatization that might arise from publicity about their involvement in the criminal process.

Paragraph 3: Reference should be made to Article 326(3) and its commentary.

Paragraph 4: Reference should be made to Article 326(3) and its commentary.

Paragraph 5: This paragraph reiterates Article 62(3).

Article 336: Records of Proceedings

1. The records of the hearings and the indictment, trial, and appeal proceedings must be sealed and stored in a secure place under lock.
2. Access to the records must be limited to persons directly concerned with the disposition of the case or other persons duly authorized by the special panel for juveniles.

Commentary

In order to give effect to the juvenile’s right to privacy set out in Article 326(3), Article 336 provides for restricted access to any records that may reveal information about criminal proceedings surrounding a juvenile. Special provisions need to be made for the secure storage of these records, in addition to the development of protocols or guidelines as to who may have access or how access can be granted.

Article 337: Juvenile Dispositions

1. Prior to juvenile dispositions, a prejuvenile disposition report must be ordered by the special panel for juveniles.
2. The prejuvenile disposition report must contain information on the background and circumstances in which the juvenile is living, the character of the juvenile, and the conditions under which the criminal offense was committed.
3. In the determination of an appropriate juvenile disposition, the special panel for juveniles must follow the procedure set out in Section 14 of Part I: General Part of the MCC.
4. The Model Detention Act applies to the imprisonment of juveniles.

Commentary

Section 14 of Part I of the MCC sets out the principles and guidelines for determining a disposition for a juvenile who has been convicted of a criminal offense.

Article 337 provides some additional procedural guidance. In line with Rule 16 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, which refers to “social inquiry reports,” Article 337 requires that a report be com-

piled about the juvenile's circumstances prior to the decision on the disposition. According to the official commentary to Rule 16, such reports "are an indispensable aid in most legal proceedings involving juveniles." The commentary notes that the report should provide the judge or judges with information on the juvenile's social and family background, school career, and education. The creation of such a report requires that adequate social services exist. Although it may be difficult to write a prejuvenile disposition report where few social services exist or there are few probation officers or other qualified personnel to write the report, authorities need to work to meet this standard.

Article 338: Conditional Release from Juvenile Imprisonment

1. Where a juvenile convicted person has been sentenced to juvenile imprisonment, he or she, through counsel, may apply to the special panel for juveniles to be conditionally released if:
 - (a) the juvenile has served at least one-third of the term of imprisonment that was imposed by the court;
 - (b) a favorable report on the conduct of the juvenile has been presented to the court by the detention authority; and
 - (c) credible evidence has been presented that the juvenile poses no danger to public security and safety.
2. The application for conditional release must be heard by the special panel for juveniles.
3. The court may impose a measure of intensive supervision under Article 82 of the MCC until the end of the original disposition. The court may also:
 - (a) prohibit the juvenile from appearing in specified places that are likely to have a negative impact on the juvenile;
 - (b) prohibit the juvenile from associating with particular persons likely to have a negative impact on the juvenile;
 - (c) require that the juvenile attend school on a regular basis; or
 - (d) require that the juvenile accept employment or training for a profession appropriate to his or her abilities or skills.
4. The court may revoke the conditional release if, during the period of conditional release, the juvenile commits a criminal offense.

5. Conditional release terminates on the day on which the convicted juvenile would have been eligible for unconditional release if the entire term of juvenile imprisonment had been completed.

Commentary

Reference should be made to the commentary to Article 273, which discusses conditional release, or *parole*, as it is called in some states. Rather than appearing in front of a conditional release panel, a juvenile may be released conditionally upon the order of the special panel for juveniles. Like with adults, the court may work with the *parole service*, or another such appropriate body, in the supervision of the conditional release of a juvenile. Where a parole service is established in a post-conflict state, the court may require that the juvenile report on a regular basis to the parole service during the period of conditional release.

Chapter 16: Right to Review the Legality of Any Deprivation of Liberty

General Commentary

The provisions of Chapter 16 apply not only to any deprivation of liberty whatsoever but also to deprivation of liberty by arrest or detention in the context of criminal proceedings. For example, it could apply to administrative detention or police detention (e.g., not relating to criminal investigation but to public order).

Ordinarily, the right to review the legality of any deprivation of liberty would be contained in a separate law. However, given that it is a crucial element of criminal procedure law, and given its importance in terms of protecting the rights of persons deprived of their liberty, the drafters decided to include it as part of the procedures under the MCPP.

Article 339: Right to Review Legality of Deprivation of Liberty (Habeas Corpus)

1. Everyone who is deprived of his or her liberty has the right to take proceedings before a court, without delay, to challenge the lawfulness of the deprivation of liberty.
2. The court must order the release of a person who has been unlawfully deprived of his or her liberty.

Commentary

Paragraph 1: The wording of Paragraph 1 is taken from Article 9(4) of the International Covenant on Civil and Political Rights. Similar wording is also contained in the American Convention on Human Rights (Article 7[6]) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5[4]), although Article 5(4) uses the term *speedily* instead of *without delay*, which is used in the International Covenant on Civil and Political Rights and the American Conven-

tion. The right to challenge the lawfulness of deprivation of liberty is also found in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Principle 32[1]).

Under the MCCP, a habeas corpus mechanism is established in Articles 340–345 to give effect to the general principle set out in Article 339. Any challenge to the lawfulness of the deprivation of liberty must be heard by a “court,” as required under international human rights law. The challenge must also be heard “without delay.” There is no objective standard as to what without delay means. The United Nations Human Rights Committee in the case of *Torres v. Finland* stated that adjudication must take place as expeditiously as possible but that each case should be assessed on a case by case basis (Communication no. 291/1988 UN document no. CCPR/C/38/D/291/1988, paragraph 7.3). In that case, the United Nations Human Rights Committee found that three months was too long a delay and violated international human rights law. Some commentators have suggested that proceedings to challenge the lawfulness of the deprivation of liberty should take place immediately, meaning in a matter of hours, days, or, in extreme circumstances, a few weeks.

Paragraph 2: Article 9(4) of the International Covenant on Civil and Political Rights provides that the court that is hearing the challenge to the lawfulness of the deprivation of liberty must immediately order the release of the applicant if the detention is found to be unlawful. This language is mirrored in the American Convention on Human Rights (Article 7[6]) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 5[4]). This language has been interpreted to mean the immediate release of the person deprived of his or her liberty at the end of the hearing on the matter. This principle is given effect in Article 344(5) of the MCCP, which provides for the “immediate release” of a person found to be unlawfully deprived of his or her liberty.

Article 340: Procedure for Filing a Motion for Habeas Corpus

1. A person deprived of his or her liberty, his or her counsel, or any other person acting on the behalf of the person may file a motion for habeas corpus with the registry of any trial court orally, in writing, or by other technical means of communication.
2. If a motion is filed in a court other than the competent trial court, the motion must be immediately transferred by the registry of the trial court in which it was initially filed to the registry of the competent trial court.

Commentary

Article 340 provides that the right to challenge the deprivation of liberty begins with the filing of a motion with the registry of any trial court. This right, strictly speaking, belongs to the person deprived of his or her liberty. That person, through his or her counsel, usually makes the application for habeas corpus. Under Paragraph 1, the MCCP allows any other person to make an application for habeas corpus, for example, a family member. This is a requirement of Article 17(1)(f) of the International Convention on the Protection of All Persons from Forced Disappearances.

Where the motion is filed by a person deprived of his or her liberty without the assistance of counsel, the police or the detention authority (as defined in Article 1[14]) must ensure that the motion is transmitted promptly to the registry on behalf of him or her. This is a crucial step in facilitating the exercise of the person's right. The police and the detention authority and the trial court may wish to draw up a protocol or standard operating procedure that sets out the mechanism by which habeas corpus motions are delivered promptly to the court. Where there are high levels of illiteracy in a state, consideration should be given to the fact that the person deprived of his or her liberty or other persons may not be able to draft written motions. Thus, Paragraph 1 allows a person to file a motion orally with the registry of the trial court. This may be undertaken simply by the person going to the registry of any trial court and requesting that the court look into the deprivation of the liberty of a person. The staff member of the registry is then required under the MCCP to enter the request into the record and to act upon it by facilitating the assignment of the motion to a judge under Article 341.

To exercise the right to challenge the lawfulness of arrest or detention as a particular form of deprivation of liberty, an arrested or detained person must know of this right. This is particularly important where he or she does not have a lawyer. In order to ensure that an arrested or detained person is made aware of it, Article 172(3) requires that an arrested person be informed of his or her right to challenge the lawfulness of arrest or detention.

Article 341: Assignment of a Motion for Habeas Corpus to a Judge

Within twenty-four hours of the motion being filed, a competent judge must be assigned to review the motion for habeas corpus.

Article 342: Assignment of a Motion for Habeas Corpus and the Initial Review of the Habeas Corpus Motion

1. Within twenty-four hours of receiving the motion for habeas corpus, the competent judge must review the written motion.
2. The competent judge may reject the motion without a hearing where the motion is manifestly unfounded or where the motion is related to a deprivation of liberty based on an order for detention or an order for continued detention. A motion that relates to an order for detention or an order for continued detention must be forwarded to the competent judge dealing with the detention.

Commentary

The drafters of the MCCP initially discussed whether to provide for a hearing of a motion for habeas corpus or whether some other review would suffice. Some were of the view that a hearing should not be provided because this would go against the principle of judicial economy, particularly where a particular person, or his or her counsel, files numerous (and potentially unfounded) motions. They argued that in a resource-starved post-conflict criminal justice system, it would be preferable for habeas corpus to be provided for by way of “paper review.” Others argued that a public hearing on habeas corpus is essential. The term habeas corpus literally means “bring the body,” the idea being that the person who has been deprived of his or her liberty is brought before the court. This is especially important in cases of alleged enforced disappearance (in which a person may be detained by the police and thereafter disappears) because it requires the authorities to explain where the person is. It may also be important to ensure that the person deprived of his or her liberty has not been tortured or subject to other cruel, inhuman, or degrading treatment. The European Court of Human Rights in the case of *Schiesser v. Switzerland* (application no. 7710/76 [1979], ECHR 5 [December 4, 1979]) held that it is a procedural requirement of the right to challenge the lawfulness of arrest or detention that the judicial officer hearing an applicant’s challenge hear the applicant himself or herself (paragraph 31), although there is no obligation that this hearing be in public (see the European Court of Human Rights case of *Nuemeister v. Austria*, application no. 1936/63 [1968], ECHR 1 [June 27, 1968], paragraph 23).

The drafters decided to adopt a solution in the MCCP whereby an initial paper review would be conducted to extract any manifestly unfounded motions (e.g. on the face of the motion, the facts alleged do not characterize an unlawful deprivation of liberty or there are no facts to substantiate an unlawful deprivation) and then in all other cases, a hearing would be set in accordance with Article 344. Where the motion

for habeas corpus concerns an order for detention or continued detention, the order must be passed to the particular judge who is responsible for overseeing the order. The reason for this is that a person who is subject to an order for detention or an order for continued detention already has sufficient means to challenge the order. In the first instance, under Article 186 and Article 188, the order for detention or continued detention must be reviewed every three months. In addition, under Article 295, the detained person may challenge the order for detention or continued detention by way of interlocutory appeal. It would thus not be in the interest of judicial economy to allow the detained person another avenue by which to challenge his or her detention when sufficient oversight and appeal mechanisms already exist.

Article 343: Date for a Hearing of a Motion for Habeas Corpus

1. The competent judge must set a time and date for a hearing of a motion for habeas corpus as soon as possible after assignment of the motion to him or her.
2. Notice must be served upon the party who made the motion, the person deprived of his or her liberty, if he or she is not the person who submitted the motion, and the prosecutor in accordance with Article 27.

Article 344: Habeas Corpus Hearing

1. On the date and at the time scheduled by the competent judge under Article 343, the person deprived of his or her liberty, his or her counsel, the prosecutor, and the applicant (if the application was made by a person other than the person deprived of his or her liberty or his or her counsel) must be present for a hearing of the motion for habeas corpus.
2. The purpose of the hearing is to assess whether the deprivation of liberty was lawful.
3. The applicant and the prosecutor may present arguments before the competent judge.
4. The hearing must be recorded in accordance with Article 37.

5. The judge must consider the lawfulness of the deprivation of liberty, taking into account all the circumstances surrounding the deprivation of liberty, the applicable law, and the legitimacy of the purpose pursued by the deprivation of liberty.
6. After hearing the argument of the parties, the competent judge must pronounce the decision on whether to grant an order for habeas corpus in the same session.
7. The competent judge must make a written order for the immediate release of a person who has been deprived of his or her liberty unlawfully. The order must be executed immediately.
8. The competent judge must issue a written decision within a reasonable time after the hearing.
9. The decision must be written and reasoned and must contain the following:
 - (a) identification of the person deprived of his or her liberty;
 - (b) identification of the person who filed the motion for habeas corpus;
 - (c) a summary of the grounds upon which the motion was based;
 - (d) the legal grounds upon which the competent judge based his or her acceptance or rejection of the motion for habeas corpus;
 - (e) the name and signature of the competent judge and the name of the competent trial court; and
 - (f) the date of the decision.
10. The decision must be served upon the person deprived of his or her liberty, his or her counsel, the person who submitted the motion for habeas corpus, if different, and the prosecutor in accordance with Article 27.

Commentary

Paragraph 5: Paragraph 5 requires that the judge assess the totality of the circumstances surrounding the deprivation of liberty. This has been held to be an essential element of the right to challenge the lawfulness of a deprivation of liberty by the European Court of Human Rights in a significant number of cases. In the case of *Brogan v. United Kingdom* (application no. 11209/84;11234/84;11266/84 [1988], ECHR 24 [November 29, 1988], paragraph 65), which concerned a deprivation of liberty through an arrest, the European Court stated that the competent judge should examine not only compliance with the procedural requirements of the applicable law but also the reasonableness of the suspicion that underpinned the arrest and the legitimacy of the purpose of the arrest. These criteria, which have been affirmed in subsequent case law, were the inspiration for Paragraph 5.

Paragraph 7: As set out in Article 344(5), where the competent judge finds that the deprivation of liberty was unlawful, the judge must order the immediate release of the person. The judge must make an immediate written order that is executed in court after the hearing to release the person deprived of his or her liberty. At a later stage, the judge is required to draft a written and reasoned judgment. This judgment is important because it may be useful where the person who was unlawfully deprived of liberty seeks compensation under Article 346.

Article 345: Investigation into an Unlawful Deprivation of Liberty

Where the court finds that a person was unlawfully deprived of his or her liberty under Article 344, the court must notify the office of the prosecutor, which must investigate the matter.

Chapter 17: Right to Compensation for Unlawful Deprivation of Liberty or Miscarriage of Justice

Article 346: Establishment of a Compensation Mechanism for Unlawful Deprivation of Liberty or Miscarriage of Justice

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1. Anyone who is unlawfully deprived of his or her liberty has an enforceable right to compensation.
 2. When a person has by a final decision been convicted of a criminal offense, and when subsequently his or her conviction has been reversed or he or she has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction must be compensated, unless it is proven that the nondisclosure of the unknown fact at the time is wholly or partly attributable to him or her.
 3. The competent legislative authority must establish a mechanism for the award of compensation for unlawful deprivation of liberty or for cases in which there are conclusive evidence of a miscarriage of justice.

Commentary

Paragraph 1: Paragraph 1 duplicates the right to compensation set out in Article 9(5) of the International Covenant on Civil and Political Rights and Article 5(5) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. This right applies only to persons who have been arrested or who have been unlawfully detained prior to a trial. It is distinct from the right contained in Para-

graph 2, which applies to persons who have been wrongly convicted, imprisoned, and then found to be innocent by a final verdict of the court.

Paragraph 2: The right to compensation for a miscarriage of justice is contained in Article 14(6) of the International Covenant on Civil and Political Rights, Article 3 of Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and Article 10 of the American Convention on Human Rights. The right to compensation for miscarriage of justice pertains to a person who has been tried and wrongfully convicted of a criminal offense and who has subsequently been punished for it, for example, by imprisonment. In addition to providing the right to compensation, the MCCP also contains a mechanism by which a conviction can be appealed on the basis of an alleged miscarriage of justice (Chapter 12, Part 2).

Paragraph 3: In order for the rights set out in Paragraphs 1 and 2 to be effected, it is necessary to establish a mechanism to provide due compensation. This mechanism would exist separate to criminal proceedings and separate from the MCCP. Legislation would be required to establish such a mechanism. Paragraph 3 provides the imprimatur to a state to establish a compensation mechanism without prescribing it. National dialogue and discussion need to take place relating to its establishment. One fact that should be borne in mind is that post-conflict states are typically resource starved, and therefore providing compensation may be inherently challenging. When a mechanism for compensation is established, a sufficient budget must be allocated to it to make it practical and effective.

Annex

Figure 1: Organization of the Court System

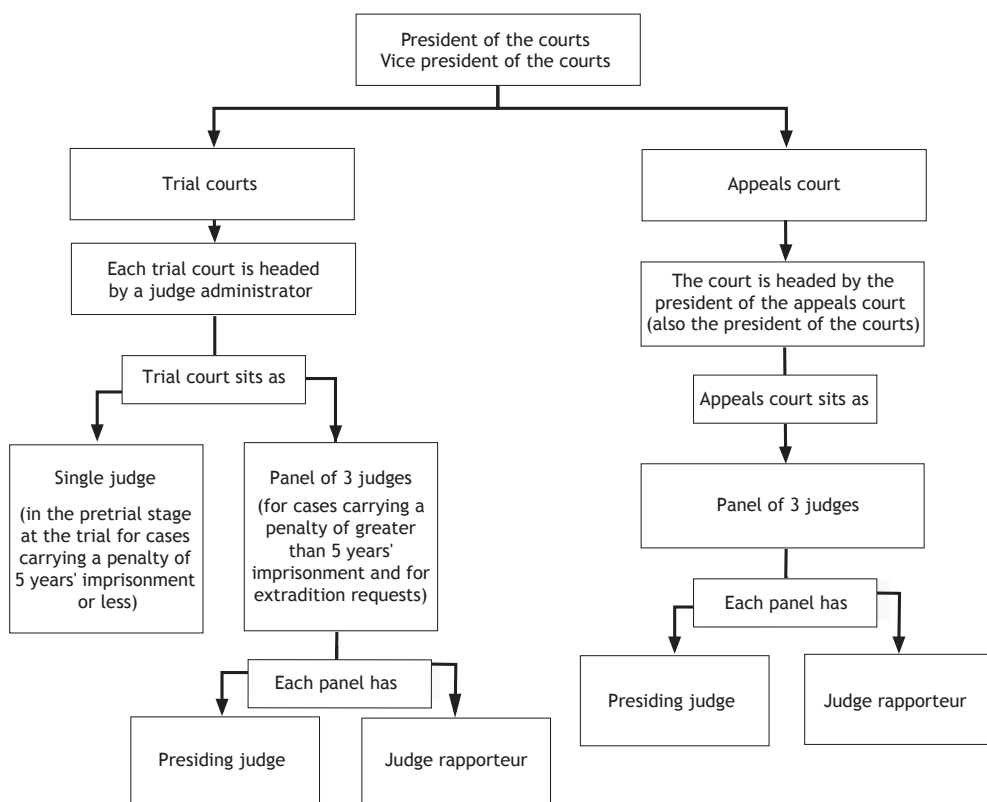


Figure 2: Organization of the Prosecution Service

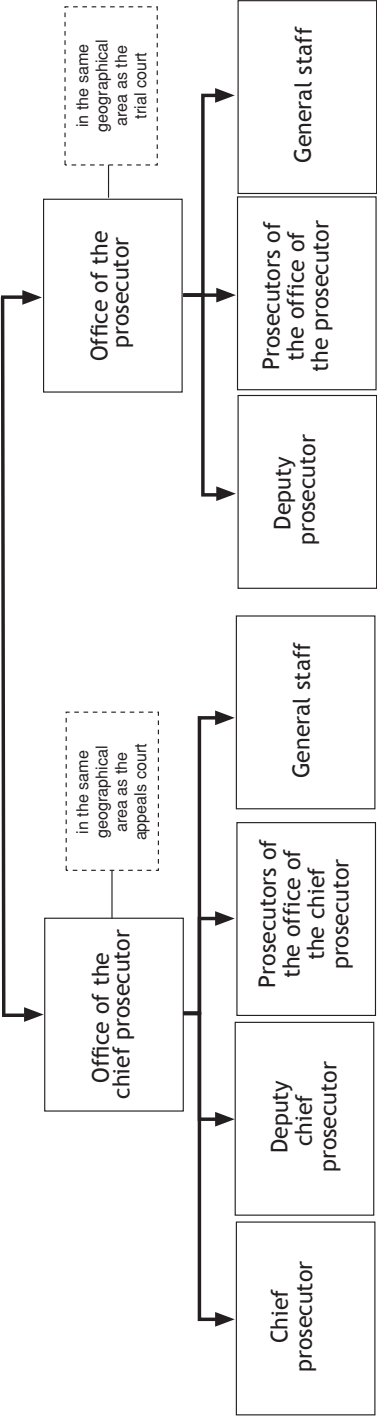


Figure 3: Flow of Criminal Proceedings

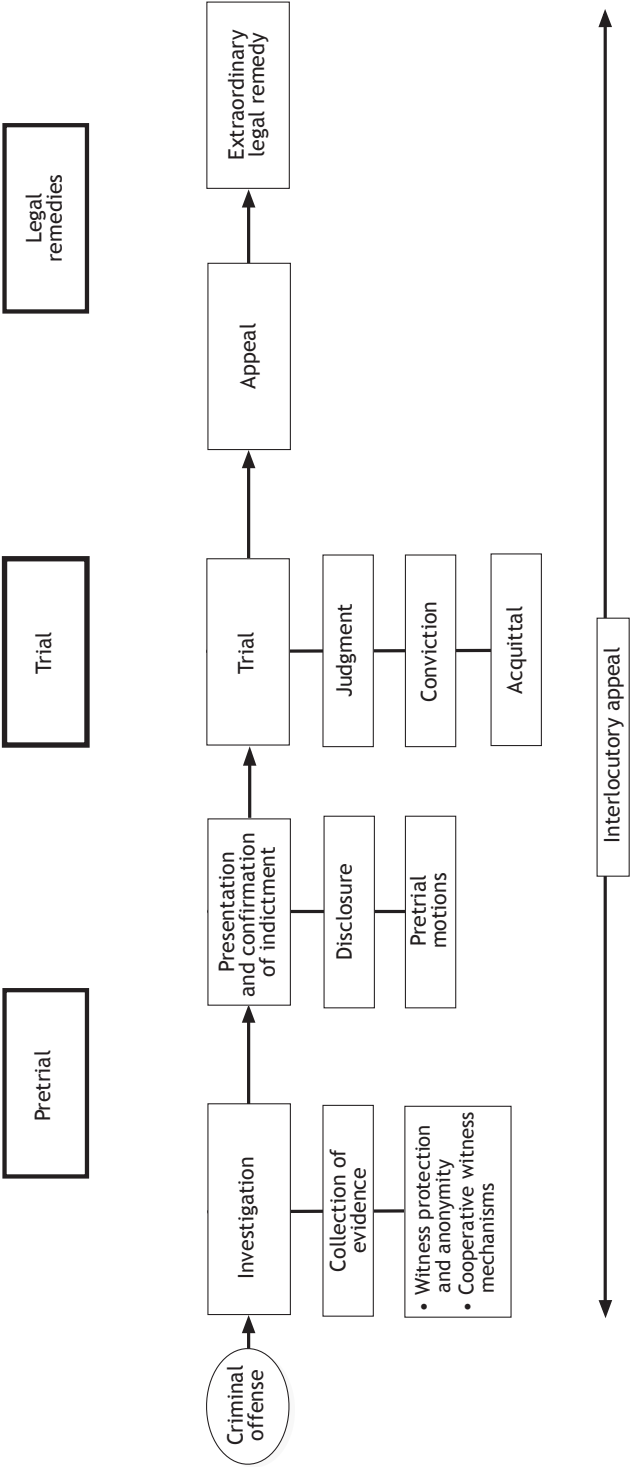


Figure 4: Flow of Criminal Proceedings: Opening of Investigation

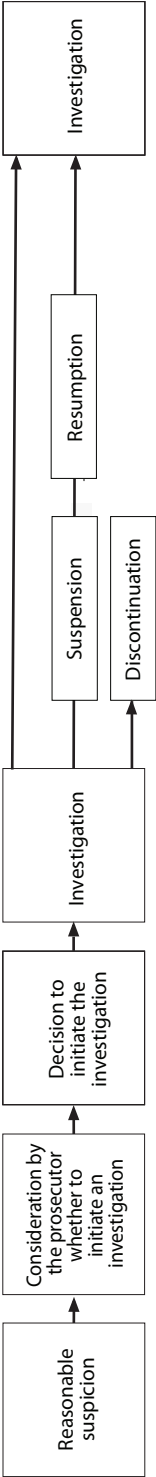


Figure 5: Investigative Measures

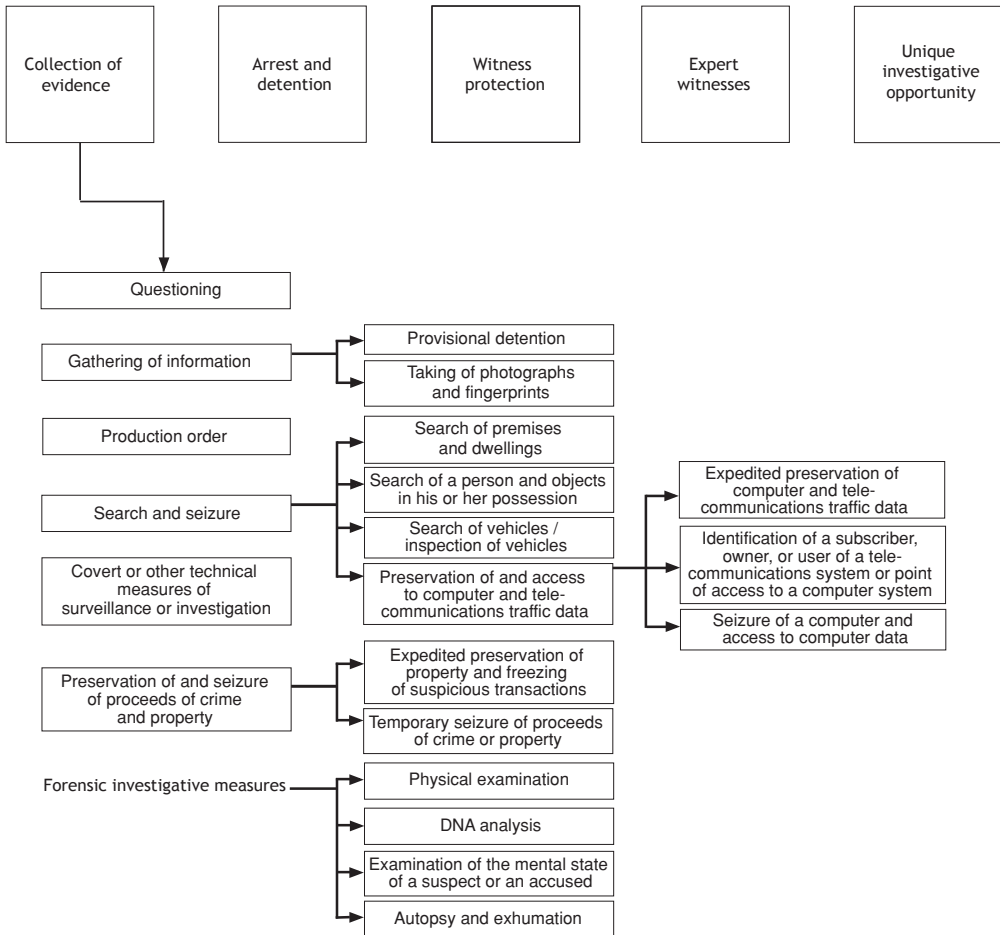


Figure 6: Flow of Criminal Proceedings—Confirmation of Indictment

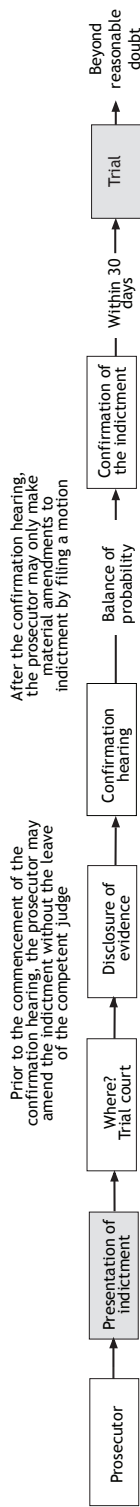
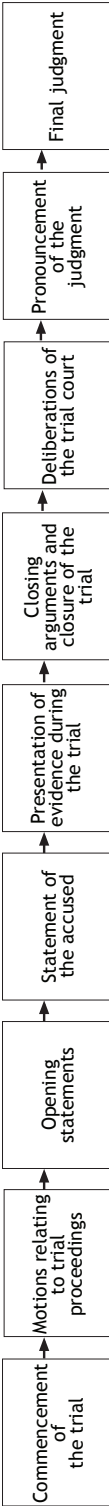


Figure 7: Flow of Criminal Proceedings—Trial



Further Reading and Resources

Legal Instruments

International and Regional Human Rights Instruments Relevant to Criminal Law and Procedure

International treaties that deal generally with fair trial and due process rights

- United Nations International Covenant on Civil and Political Rights and its two additional protocols

Regional treaties that deal generally with fair trial and due process rights

- African Charter on Human and Peoples' Rights
- American Convention on Human Rights
- American Declaration of the Rights and Duties of Man
- Arab Charter on Human Rights
- European Charter of Fundamental Rights
- European Convention for the Protection of Human Rights and Fundamental Freedoms and its fourteen additional protocols

International treaties that deal with specific human rights and groups of persons

- Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- United Nations Convention on the Elimination of All Forms of Discrimination against Women
- United Nations Convention on the Rights of the Child
- United Nations International Convention on the Elimination of All Forms of Racial Discrimination
- United Nations International Convention on the Protection of All Persons from Enforced Disappearance

Regional treaties that deal with specific rights and groups of persons

- African Charter on the Rights and Welfare of the Child
- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention to Prevent and Punish Torture
- Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

International and Regional Instruments Relevant to Crime and Criminal Investigation

Corruption

- Council of Europe Civil Law Convention on Corruption
- Council of Europe Criminal Law Convention on Corruption
- European Union Convention on the Fight against Corruption Involving Officials of the European Communities or Officials of Member States of the European Union
- InterAmerican Convention against Corruption
- Organization for Economic Cooperation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
- South African Development Community Protocol against Corruption
- United Nations Convention against Corruption

Cybercrime

- Council of Europe Convention on Cybercrime

Drug trafficking and production

- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances
- United Nations Convention on Psychotropic Substances
- United Nations Single Convention on Narcotic Drugs

Extradition

- Economic Community of West African States Convention on Extradition
- European Convention on Extradition and its additional protocols
- Inter-American Convention on Extradition

Money laundering

- Council of Europe Convention on the Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and Financing of Terrorism

Mutual legal assistance

- Arab League Convention on Mutual Legal Assistance in Criminal Matters
- Convention on Mutual Legal Assistance in Criminal Matters between Member States of the European Union
- Economic Community of West African States Convention on Mutual Assistance in Criminal Matters
- European Convention on Mutual Legal Assistance in Criminal Matters and its additional protocols
- Inter-American Convention on Mutual Assistance and Optional Protocol Thereto
- Vienna Convention on Consular Relations and its additional protocols

Organized crime

- United Nations Convention against Transnational Organized Crime

Smuggling of migrants

- Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention against Transnational Organized Crime

Terrorist acts and terrorism

- Arab Convention for the Suppression of Terrorism
- Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime and on the Financing of Terrorism
- Council of Europe Convention on the Prevention of Terrorism
- Inter-American Convention against Terrorism
- Organization of the African Union Convention on the Prevention and Combating of Terrorism
- United Nations Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation
- United Nations Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation
- United Nations Convention for the Suppression of Unlawful Seizure of Aircraft
- United Nations Convention on Offences and Certain Other Acts Committed on Board Aircraft
- United Nations Convention on the Marking of Plastic Explosives for the Purpose of Detection
- United Nations Convention on the Physical Protection of Nuclear Material
- United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons

- United Nations International Convention against the Taking of Hostages
- United Nations International Convention for the Suppression of Terrorist Bombings
- United Nations International Convention for the Suppression of the Financing of Terrorism
- United Nations Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf
- United Nations Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation

Trafficking in firearms

- Inter-American Convention against the Illicit Manufacturing of and Trafficking in Firearms, Ammunition, Explosives and Other Related Materials
- United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, Supplementing the United Nations Convention against Transnational Organized Crime

Trafficking in persons

- Council of Europe Convention on Action against Trafficking in Human Beings
- SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution
- United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime

International Criminal Law Instruments

- Elements of Crimes to the Rome Statute of the International Criminal Court
- Rome Statute of the International Criminal Court
- Rules of Procedure and Evidence of the International Criminal Court
- Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of Rwanda since 1991
- Rules of Procedure and Evidence for the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991
- Rules of Procedure and Evidence for the Special Court for Sierra Leone (last amended 29 May 2004)
- Statute of the International Criminal Tribunal for Rwanda
- Statute of the International Criminal Tribunal for the Former Yugoslavia

- Statute of the Special Court for Sierra Leone
- Uniform Rules of Procedure, Military Tribunals, Nuremberg, Revised to 8 January 1948

Nonbinding Human Rights Principles and Instruments

- African Union Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa
- Bangalore Principles of Judicial Conduct
- Cairo Declaration of Human Rights in Islam
- Declaration of Human Rights of Individuals Who Are Not Nationals of the Country in which They Live
- Suva Statement on the Principles of Judicial Independence and Access to Justice
- United Nations Basic Principles on the Independence of the Judiciary
- United Nations Basic Principles on the Role of Lawyers
- United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power
- United Nations Declaration on the Elimination of Violence against Women
- United Nations Declaration on the Protection of All Persons from Enforced Disappearances
- United Nations Declaration on the Rights of the Child
- United Nations Draft Declaration on the Right to a Fair Trial and a Remedy
- United Nations Guidelines for the Prevention of Juvenile Delinquency
- United Nations Guidelines on the Role of Prosecutors
- United Nations Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions
- United Nations Procedures for the Effective Implementation of the Basic Principles on the Judiciary
- United Nations Rules for the Protection of Juveniles Deprived of Their Liberty
- United Nations Standard Minimum Rules for Noncustodial Measures
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice
- United Nations Standard Minimum Rules for the Treatment of Prisoners
- Universal Islamic Declaration of Human Rights

Further Reading Relevant to the Model Code of Criminal Procedure

Child Victims and Witnesses

International Bureau for Children's Rights. *Guidelines on Justice for Child Victims and Witnesses of Crime*. 2004. http://www.unodc.org/pdf/crime/expert_mtg_2005-03-15/res_2004-27_e.pdf.

The guidelines are based on good practices and international and regional norms, standards, and principles related to justice for child victims and witnesses of crimes. The guidelines aim to assist professionals who work with these children, governments that review national laws and procedures to respect the rights of child victims and witnesses, and other pertinent organizations and agencies that design and implement policies and programs to address relevant issues. A child-friendly version of these guidelines is available at http://www.ibcr.org/Publications/VICWIT/2007_Child-Friendly_Guidelines_En.pdf.

International Centre for Criminal Law Reform and Criminal Justice Policy. *Model Guidelines for the Effective Prosecution of Crimes against Children: The Annotated Version*. August 2001. <http://www.icclr.law.ubc.ca/Publications/Reports/modelguidelines-2001.pdf>.

Model Guidelines is intended as a practical instrument on the prosecution of crimes against children and in the treatment of child victims and witnesses. The guidelines seek to implement and build upon international human rights norms and standards. Taking into account the differences between legal systems, the guidelines help leaders of prosecution units establish child-sensitive policies and individual prosecutors adopt child-sensitive practices in their work.

Criminal Investigation

Forensic investigation

American Psychological Association. Committee on Ethical Guidelines for Forensic Psychologists. *Specialty Guidelines for Forensic Psychologists*. 1991. <http://www.unl.edu/ap-ls/student/Specialty%20Guidelines.pdf>.

These guidelines are designed to help forensic psychologists monitor their professional conduct when assisting courts, parties to legal proceedings, correctional and forensic mental health facilities, and legislative agencies. The guidelines aim to enhance forensic psychology as a discipline and as a profession by improving the quality of services offered to individual clients and to the legal system.

United Nations. *Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions*. UN Doc. E/ST/CSDHA/.12 (1991). <http://www1.umn.edu/humanrts/instree/executioninvestigation-91.html>.

Extralegal, arbitrary, and summary executions—such as political assassinations, deaths resulting from torture or ill-treatment in prison or detention, death resulting from enforced disappearances, deaths resulting from the excessive use of force by law-enforcement personnel, executions without due process, and acts of genocide—often occur without documentation or detection. The failure to detect and disclose these executions to the international community interferes with the rendering of justice for past executions and the prevention of future executions. To address this issue, this manual provides international human rights standards relevant to such executions; a model protocol for a legal investigation of extralegal, arbitrary, and summary executions; a model autopsy protocol; and a model protocol for the disinterment and analysis of skeletal remains.

Investigation of corruption

Bolongaita, Emil. *Controlling Corruption in Post-Conflict Countries*. Kroc Institute Occasional Paper no. 26. Notre Dame, Indiana: Joan B. Kroc Institute for International Peace Studies, Notre Dame University, January 2005. http://kroc.nd.edu/ocpapers/p_26_2.pdf.

This paper analyzes the corrosive effects of corruption on post-conflict agendas. Bolongaita argues that anticorruption efforts should be a component in any peace agreement and stresses the need for rigorous monitoring and evaluation mechanisms.

Center for Democracy and Governance. *A Handbook on Fighting Corruption*. 1999. http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnace070.pdf.

This handbook sets out a framework to assist in the development of strategic responses to public corruption. It describes the root causes of corruption, identifies a range of institutional and social reforms to address them, and introduces a methodology for selecting among these measures.

Council of Europe. *Criminal Law Convention on Corruption: Explanatory Report*. ETS no. 173. 1998. <http://conventions.coe.int/Treaty/en/Reports/Html/173.htm>.

This interpretative supplement aims to facilitate a better understanding of the Council of Europe Criminal Law Convention on Corruption by explaining its various articles. It also presents a general discussion of corruption and the various legal and policy measures developed to combat it.

Council of Europe. Committee of Ministers. Resolution (97) 24. On the Twenty Guiding Principles for the Fight against Corruption. 1997. [http://www.coe.int/t/dg1/greco/documents/Resolution\(97\)24_EN.pdf](http://www.coe.int/t/dg1/greco/documents/Resolution(97)24_EN.pdf).

Posited on the idea that corruption represents a threat to democracy and the rule of law and constitutes a denial of human rights, Resolution (97) 24 elaborates on twenty comprehensive and far-reaching principles created to fight corruption from both a legal and a policy perspective.

Council of Europe. Committee of Ministers. Model Code of Conduct for Public Officials. Appendix to Recommendation No. R (2000) 10. 2000. [http://www.coe.int/t/dg1/greco/documents/Rec\(2000\)10_EN.pdf](http://www.coe.int/t/dg1/greco/documents/Rec(2000)10_EN.pdf).

This resource, intended to help those drafting a code of conduct for public officials, addresses such topics as reporting of acts of corruption, conflict of interest, political and public activities of public officials, acceptance of gifts, reactions to improper offers, information held by public authorities, and integrity checking.

Large, Daniel, ed. *Corruption in Postwar Reconstruction: Confronting the Vicious Circle*. Lebanese Transparency Association and United Nations Development Programme. 2005. <http://www.transparency-lebanon.org/Publications/Corruption%20in%20PWR.htm>.

This is a collection of case study-oriented perspectives (including views from Lebanon, Bosnia and Herzegovina, and Sierra Leone) on the impact of corruption on postwar reconstruction and the relationship between corruption and serious crime.

Transparency International. *Corruption Fighters' Tool Kit*. 2001, 2002, and 2004 (special edition). http://www.transparency.org/tools/e_toolkit.

These compendia of practical civil society anticorruption experiences present anticorruption tools developed and implemented by Transparency International's national chapters and other civil society organizations around the world. The toolkits highlight the potential of civil society to create mechanisms for monitoring public institutions and to demand and promote accountable and responsive public administration.

United Nations. *International Code of Conduct for Public Officials*. UN Doc. A/51/59. 1996. <http://www.un.org/documents/ga/res/51/a51r059.htm>.

In response to the growing problem of corruption, and in light of the link between corruption and the public sector, the United Nations developed a code of conduct for public officials. This code contains general principles regarding the role of public officials, as well as principles concerning conflict of interest and disqualification, disclosure of assets, acceptance of gifts and favors, confidential information, and political activity.

United Nations Office on Drugs and Crime. *Corruption: Compendium of International Legal Instruments on Corruption*. 2nd ed. New York: United Nations. 2005. http://www.unodc.org/pdf/crime/corruption/compendium_e.pdf.

The compendium includes both the summaries and the full texts of corruption-related international legal instruments from the United Nations, the African Union, the Council of Europe, the Organization of American States, the Organization of Economic Cooperation and Development, and the Council of the European Union.

United Nations Office on Drugs and Crime. *Legislative Guide for the Implementation of the United Nations Convention against Corruption*. New York: United Nations. 2006. http://www.unodc.org/pdf/corruption/CoC_LegislativeGuide.pdf.

This guide provides states with practical guidance on how to implement the provisions of the convention into domestic law by identifying legislative requirements, issues arising from those requirements, and various options available to states as they develop and draft the necessary legislation.

United Nations Office on Drugs and Crime. *United Nations Anti-Corruption Toolkit*. 3rd ed. Vienna: United Nations. 2004. http://www.unodc.org/pdf/crime/corruption/toolkit/corruption_un_anti_corruption_toolkit_sep04.pdf.

Continually updated, the toolkit covers the following areas: assessments of corruption levels, institution building, social prevention, anticorruption legislation, monitoring and evaluation, international legal cooperation, and asset recovery and protection.

United Nations Office on Drugs and Crime. *United Nations Guide for Anti-Corruption Policies*. 2003. http://www.unodc.org/pdf/crime/corruption/UN_Guide.pdf.

This document, intended for use by political officials, senior policymakers, and other actors, contains a general outline of the nature and scope of the problem of corruption and a description of major elements of anti-corruption policies.

Investigation of cybercrime

Council of Europe. *Convention on Cybercrime: Explanatory Report*. ETS no. 185. 2001. <http://conventions.coe.int/treaty/en/Reports/Html/185.htm>.

This is an interpretative supplement to the Convention on Cybercrime that aims to facilitate a better understanding of the convention by explaining its various articles. It also presents a general discussion of cybercrime and the various legal and policy measures developed to combat it, including measures of criminal procedure law.

Investigation of domestic violence

United Nations Commission on Human Rights. *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences: A Framework for Model Legislation on Domestic Violence*. UN Doc. E/CN.4/1996/53/Add.2. <http://www.unhchr.ch/Huridocda/Huridoca.nsf/TestFrame/0a7aa1c3f8de6f9a802566d700530914?OpenDocument>.

This resource, intended as a drafting guide for legislators and advocates, outlines those elements that are integral to comprehensive legislation on domestic violence, including those elements integral to criminal procedure law.

Investigation of money laundering

Asian Development Bank. *Manual on Countering Money Laundering and the Financing of Terrorism*. 2003. http://www.adb.org/Documents/Manuals/Countering_Money_Laundering/default.asp.

The manual brings together many of the various international conventions, principles, recommendations, guidelines, and model laws on the prosecution and investigation of money laundering and financing of terrorism.

Commonwealth Organization. *Commonwealth Model Law for the Prohibition of Money Laundering and Supporting Documentation*. 1996. <http://www.imolin.org/pdf/imolin/Comsecml.pdf>.

This resource provides a model anti-money laundering law that includes provisions on criminalization, freezing and forfeiture of assets, mutual legal assistance, and extradition.

United Nations Office on Drugs and Crime. *An Overview of the UN Conventions and the International Standards Concerning Anti-Money Laundering Legislation*. 2004. <http://www.imolin.org/imolin/index.html>.

A collation of the various international conventions and standards on anti-money laundering legislation, this publication is subdivided into topics such as customer identification, record keeping, reporting, criminalization, international cooperation, and financial intelligence units.

United Nations Office on Drugs and Crime. *Model Anti-Money Laundering Legislation*. http://www.unodc.org/unodc/money_laundering_technical_assistance.html.

This model law was developed for use in states whose fundamental legal systems are substantially based on the common law tradition. The law contains provisions on the criminalization of money laundering and the financing of terrorism, in addition to criminal procedure measures on forfeiture and confiscation of property.

Investigation of organized crime

Austin, Alexander, Tobias von Gienanth, and Wibke Hansen. *Organized Crime as an Obstacle to Successful Peacebuilding: Lessons Learned from the Balkans, Afghanistan, and West Africa*. Berlin: Center for International Peace Operations, 2003. http://www.zif-berlin.org/Downloads/Berlin-Workshop_2004.pdf.

This report summarizes the discussions at the Seventh International Berlin Workshop, which considered such topics as the effects of organized crime on successful peacebuilding, key organized crime actors and their methods, and the extent to which the fight against serious crime in peace operations is part of the overall international struggle against organized criminal activity.

CARDS Regional Police Project (CARPO). *Regional Strategy on Tools against Organised and Economic Crime with Project Area Specific Actions*, September 2005. http://www.stabilitypact.org/rt/Brijuni_Regional_strategy.pdf.

CARPO's high-level meeting of ministers and officials held in 2005 offers assessments of the progress in the fight against organized crime in south-eastern Europe and examines common benchmarks and sectoral strategies on crime analysis and criminal intelligence, financial investigations and confiscation of criminal proceeds, special investigative means, witness protection, and cooperation in criminal matters.

Council of Europe. *Convention on Laundering, Search, Seizure, and Confiscation of the Proceeds from Crime and on Financing of Terrorism: Explanatory Report*. ETS no. 141. 1990. <http://conventions.coe.int/Treaty/EN/Reports/Html/141.htm>.

This report explains the convention's various articles and presents a general discussion of money laundering and the financing of terrorism and the various legal and policy measures developed to combat these offenses, including criminal procedure measures.

Council of Europe, Octopus Program. *Combating Organized Crime: Best-Practice Surveys of the Council of Europe*. Strasbourg: Council of Europe Publishing, 2004.

A compilation of best-practice surveys of efforts to tackle organized crime, this publication offers information on a wide variety of measures, including witness protection, reversing the burden of proof in confiscating the proceeds of crime, intercepting communications, intrusive surveillance, crime analysis, cross-border cooperation, cooperation to combat human trafficking, and preventive legal measures against organized crime.

Financial Action Task Force on Money Laundering. *The Forty Recommendations of the Financial Action Task Force on Money Laundering*. 28 June 1996. <http://www.fincen.gov/40rec.pdf>.

The Financial Action Task Force on Money Laundering (FATF) is an inter-governmental body that promotes the development of policies to combat money laundering. The FATF aims to prevent criminal proceeds from financing other criminal activities and affecting legitimate economic activities. *Forty Recommendations* sets out the basic framework for anti-money laundering efforts, focusing on the criminal justice system, law enforcement, the financial system and its regulation, and international cooperation.

United Nations. Eleventh United Nations Congress on Crime Prevention and Criminal Justice. *Effective Measures to Combat Transnational Organized Crime: Working Paper Prepared by the Secretariat*. UN Doc. A/CONF.2005/4. 2005. <http://daccess-ods.un.org/TMP/7982045.html>.

This working paper, produced in preparation for the Eleventh United Nations Congress on Crime Prevention and Criminal Justice held in Bangkok in April 2005, discusses both the phenomenon of organized crime and the kinds of international and national responses required to combat its various manifestations.

United Nations. *Interpretative Notes for the Official Records of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents/index.htm.

These interpretive notes to the United Nations Convention against Transnational Organized Crime and the Protocols Thereto are taken from the negotiations of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime. They are helpful in deciphering the meaning of the final provisions included in the convention and its protocols.

United Nations Office on Drugs and Crime, Division for Treaty Affairs. *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. New York: United Nations, 2004. http://www.unodc.org/unodc/organized_crime_convention_legislative_guides.html.

This publication contains legislative guides for the Convention against Transnational Organized Crime; the Protocol to Prevent, Suppress, and Punish Trafficking in Persons; the Protocol against the Smuggling of Migrants by Land, Sea and Air; and the Protocol against Illicit Manufacturing of and Trafficking in Firearms.

Investigation of terrorist acts

Council of Europe. Guidelines on Human Rights and the Fight against Terrorism. 2002. http://www.coe.int/t/F/Droits_de_l'Homme/Guidelines.asp.

These guidelines on protecting human rights and fighting terrorism, adopted by the Council of Europe's Committee of Ministers on July 11, 2002, affirm the obligation of states to protect everyone against terrorism, and reiterate the need to avoid arbitrariness. They also stress that all measures taken by states to combat terrorism must be lawful and that torture must be prohibited. The legal framework set out in the guidelines addresses, in particular, the collecting and processing of personal data, measures that interfere with privacy, arrest, police custody and pretrial detention, legal proceedings, extradition, and compensation of victims.

International Monetary Fund. Suppressing the Financing of Terrorism: A Handbook for Legislative Drafting. 2003. <http://www.imf.org/external/pubs/nft/2003/SFTH/index.htm>.

This handbook is intended to assist states in preparing legislation to implement international obligations contained in a range of international norms and standards on the financing of terrorism.

United Nations Office on Drugs and Crime. *Legislative Guide to the Universal Anti-Terrorism Conventions and Protocols*. 2003. http://www.unodc.org/pdf/crime/terrorism/explanatory_english2.pdf.

Between 1963 and 1999, the international community negotiated twelve universal legal instruments addressing the prevention and suppression of terrorism. Additionally, in 2005, the General Assembly adopted the International Convention for the Suppression of Acts of Nuclear Terrorism (Resolution 59/290, Annex), the Amendment to the Convention on the Physical Protection of Nuclear Material, the Protocol of 2005 to the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, and the Protocol of 2005 to the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf. These universal legal instruments, amendments, and protocols represent the global regime against terrorism and provide a framework for international cooperation in countering terrorism. This legislative guide provides an overview of the relevant general principles of these international legal instruments for countries considering ratification and implementation of one or more of them. It provides model laws and explanatory materials for the conventions and protocols, which each country should adapt to suit its own context. The legislative guide also offers instances of state practice and national legislation that satisfy the core requirements of the international legal instruments regarding terrorism.

United Nations Office of the High Commissioner for Human Rights. Digest of the Jurisprudence of the United Nations and Regional Organizations on Protecting Human Rights while Countering Terrorism. 2003. <http://www.ohchr.org/english/about/publications/docs/digest.doc>.

This resource is a compilation of findings of judicial and quasijudicial bodies of the United Nations and regional organizations regarding the protection of human rights in the struggle against terrorism. Its aim is to assist policymakers and other concerned parties in developing a vision of counterterrorism strategies that fully respect human rights.

Investigation of torture

African Commission on Human and Peoples' Rights. *Guidelines and Measures for the Prohibition and Prevention of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa* (the "Robben Island Guidelines"). 2002. <http://www1.umn.edu/humanrts/achpr/tortguidelines.html>.

These guidelines contain fifty separate sections on the prohibition and prevention of torture and cruel, inhuman, or degrading treatment or punishment.

Amnesty International. *Combating Torture—A Manual for Action*. 2003. <http://web.amnesty.org/pages/stoptorture-manual-index-eng>.

This manual compiles the standards and recommendations of the United Nations, the European Committee for the Prevention of Torture, Amnesty International, and other organizations from around the world concerning the prevention of torture and ill-treatment. The chapters address the prohibition of torture under international law, safeguards in custody, conditions of detention, torture in other settings, and overcoming impunity. There are also case studies on successful actions taken to combat torture in different countries, checklists of international standards, and suggestions for further reading.

European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). *The CPT Standards: "Substantive" Sections of the CPT's General Reports*. CPT/Inf/E (2002) 1-Rev. 2006. <http://www.cpt.coe.int/EN/docs/standards.htm>.

This resource contains a set of standards developed by the CPT to guide national authorities on how persons deprived of their liberty ought to be treated and what treatment constitutes torture or cruel or inhuman treatment or punishment. The substantive sections address a range of issues including police custody, imprisonment, training of law enforcement personnel, health care services in prisons, foreign nationals detained under aliens' legislation, involuntary placement in psychiatric establishments, and juveniles and women deprived of their liberty.

Foley, Conor. *Combating Torture: A Manual for Judges and Prosecutors*. Essex, UK: University of Essex, 2003. <http://www.essex.ac.uk/combatingtorturehandbook/manual>.

This manual provides guidance for judges and prosecutors on investigating acts of torture based on international human rights norms and standards. It contains checklists of good practice; outlines the prohibition of torture in international law and safeguards that exist to guard against torture and other ill-treatment of people deprived of their liberty; describes the role of judges and prosecutors in ensuring that these standards are upheld and safeguards are in place; and discusses the prosecution of those involved in torture or other forms of ill-treatment, including how to identify them.

Reidy, Aisling. *The Prohibition of Torture: A Guide to the Implementation of Article 3 of the European Convention on Human Rights*. Human Rights Handbooks, no. 6. Council of Europe, 2002. http://www.coe.int/T/E/Human_rights/hrhb6.pdf.

This handbook explains the nature, scope, and meaning of “torture,” “cruel, inhuman or degrading treatment,” and “cruel, inhuman or degrading punishment” and outlines the measures that states should take to ensure that all persons are free from such practices. It also discusses the prohibition of torture with regard to arrest, detention, and conditions of detention and elaborates standards on forensics, the behavior of law enforcement forces, investigations, and prosecutions.

United Nations. *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (the “Istanbul Protocol”). General Assembly Resolution 55/89 of December 4, 2000. <http://www.ohchr.org/english/law/investigation.htm>.

The Istanbul Protocol developed by the United Nations is intended to serve as a set of international guidelines for the assessment of persons who allege torture and ill-treatment, for investigating cases of alleged torture, and for reporting such findings to the judiciary and any other investigative body.

Investigation of trafficking in persons

American Bar Association and Central European and Eurasian Law Initiative (CEELI). *The Human Trafficking Assessment Tool*. Washington, D.C.: American Bar Association, 2005. <http://www.abanet.org/ceeli/publications/htat/home.html>.

CEELI’s *Human Trafficking Assessment Tool* allows a state to measure its legal and practical compliance with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (United Nations Trafficking Protocol), which supplements the United Nations Convention against Transnational Organized Crime. This document also elaborates upon the obligations set forth in the protocol and its host convention and provides a sample analysis of national antitrafficking laws and government efforts to combat trafficking against the benchmark of these standards.

Global Rights. *Annotated Guide to the Complete UN Trafficking Protocol*. 2000. http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723.

This guide is designed to assist advocates in the development of an adequate legal and policy framework for combating trafficking of persons. It analyzes the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, provision-by-provision, and deconstructs the obligations contained in each one, while providing examples of how states can comply with these obligations.

Oswald, Bruce, and Sarah Fennin. "Combating the Trafficking of Persons on Peace Operations." In *International Peacekeeping: The Yearbook of International Peace Operations*, vol. 10, ed. Harvey Langholtz, Boris Kondoc, and Alan Wells. Leiden and Boston: Martinus Nijhoff, 2006. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913680.

Inspired by the "Training Package on Human Rights for Military Personnel of Peace Operations," this article looks at the growing problem of trafficking of persons for the purposes of economic or sexual exploitation during peace operations.

United Nations Department of Peacekeeping Operations (DPKO), *Best Practices Section. Human Trafficking and United Nations Peacekeeping: DPKO Policy Paper*. March 2004. <http://www.un.org/womenwatch/news/documents/DPKOHumanTraffickingPolicy03-2004.pdf>.

This DPKO policy paper examines the problem of human trafficking in the context of United Nations peacekeeping. Based on lessons from previous peacekeeping missions and consultations with partner organizations in the fight against trafficking, it proposes a comprehensive strategy for the DPKO to address human trafficking in post-conflict states.

United Nations Interim Administration in Kosovo (UNMIK). *Combating Human Trafficking in Kosovo: Strategy and Commitment*. May 2004. http://www.unmikonline.org/misc/UNMIK_Whit_paper_on_trafficking.pdf.

This UNMIK report defines the human trafficking problem in Kosovo, proposes strategies to combat it, and analyzes continuing problems in efforts to counter it. It specifically addresses human trafficking as a part of the overall fight against organized crime, zero-tolerance enforcement against traffickers, protection and assistance for victims, and sustainability through local involvement in a multidimensional approach.

United Nations Office on Drugs and Crime, Division for Treaty Affairs. *Legislative Guide for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto*. New York: United Nations, 2004. http://www.unodc.org/unodc/organized_crime_convention_legislative_guides.html.

This publication contains a legislative guide to the Protocol to Prevent, Suppress, and Punish Trafficking in Persons.

Court Administration

Legal Vice Presidency of the World Bank. *Court Records Assessment Manual*. November 2002. http://www-wds.worldbank.org/.../23/000112742_20031023164344/Rendered/PDF/269180Court0ReIsment0Manual0SCODE09.pdf.

This manual draws upon broad principles of records and information management to accommodate the different requirements of courts in various countries. This approach provides a methodology for assessing whether systems in particular countries are consistent with general principles and serve the needs of the courts and citizens. This manual has been developed and tested in a series of case studies in Argentina, Ecuador, Singapore, South Africa, and The Gambia.

Fair Trial and Due Process Rights in Criminal Proceedings

Amnesty International. *Fair Trials Manual*. London: Amnesty International United Kingdom, 1998. <http://www.amnesty.org/ailib/intcam/fairtrial/fairtria.htm>.

This manual provides information regarding international and regional standards that protect the right to a fair trial. Its intended users are observers and others assessing the fairness of an individual case, as well as those evaluating whether a country's criminal justice system guarantees respect for international standards of fair trial. The manual covers pretrial rights, rights at trial and during appeals, and special cases, which include death penalty trials, cases involving children, and fair trial rights during armed conflict.

Gomien, Donna. *Short Guide to the European Convention on Human Rights*. 3rd ed. Strasbourg: Council of Europe Publishing, 2005. [http://www.coe.int/T/E/Human_rights/h-inf\(2002\)5eng.pdf](http://www.coe.int/T/E/Human_rights/h-inf(2002)5eng.pdf).

This book provides an overview of the basic rights guaranteed by the European Convention on Human Rights. It also discusses the relevant case law, which is useful in ascertaining the international fair trial and due process standards relevant to criminal proceedings

Joseph, Sarah, Jenny Schultz, Melissa Castan and Ivan Shearer. *The International Covenant on Civil and Political Rights: Cases, Commentary and Materials*. Oxford: Oxford University Press, 2005.

This book addresses the implementation and adjudication of the International Covenant on Civil and Political Rights, particularly as it evolves with world events and the growth of literature on the topic. It compiles literature, United Nations documents and jurisprudence, and state reports on the various articles of the covenant. In part III, entitled "Subjective Rights," the author discusses "Procedural Guarantees in Civil and Criminal Trials" under Article 14 of the covenant.

Kilkelly, Ursula. *The Right to Respect for Private and Family Life: A Guide to the Implementation of Article 8 of the European Convention on Human Rights*. Human Rights Handbooks, no. 1. Council of Europe, 2001. http://www.coe.int/T/E/Human_rights/hrhb1.pdf.

Designed to assist judges, the Council of Europe's Human Rights Handbooks series provides guidance regarding the implementation of the European Convention on Human Rights. This guide discusses the meaning and scope of the right to respect for private and family life as set forth in Article 8 of the convention. The guide is relevant to understanding how the right to privacy should be protected through the course of a criminal investigation, such as during a search of a person or property or when conducting covert surveillance measures.

Mole, Nuala, and Catharina Harby. *Right to a Fair Trial: A Guide to the Implementation of Article 6 of the European Convention on Human Rights*. Human Rights Handbooks, no. 3. Council of Europe, 2001. http://www.coe.int/t/e/human_rights/1hrhb7.pdf.

Designed to assist judges, the Human Rights Handbooks series produced by the Council of Europe provides guidance for implementing the European Convention on Human Rights. This guide discusses the meaning and scope of the right to a fair trial set forth in Article 6 of the convention. It addresses the various elements of the rights to a fair trial, including civil rights and obligations, criminal charges, public hearings and pronouncements, reasonable time guarantees, independent and impartial tribunals, fair hearings, special rights of juveniles, admissibility of evidence, presumption of innocence, intelligible notification of charges, adequate time and facilities, right to representation and legal aid, right to witness attendance and examination, and right to an interpreter.

Nowak, Manfred. *U.N. Covenant on Civil and Political Rights: CCPR Commentary*. 2nd ed. Arlington, Virginia: N.P. Engel, 2005.

This book provides readers with an easily accessible resource on the International Covenant on Civil and Political Rights. It is arranged on an article by article basis and provides relevant information regarding international standards that pertain to criminal proceedings in its discussion of Articles 9, 10, 14, 17, and 26 of the covenant.

Osse, Anneke. *Understanding Policing: A Resource for Human Rights Activists*. Amnesty International. 2006. <http://www.amnesty.nl/documenten/phrp/Understanding%20policing%20Part%201.pdf>.

This resource facilitates cooperation between human rights activists and police by helping activists to understand the concerns and realities of police work. Police play an essential role in the protection of human rights, a point that is often overlooked in favor of criticizing them as violators of human rights. Human rights do not impede policing, but rather provide police the ability to operate and use their powers lawfully. Although this

collaboration may require a change in practice on the part of both the police and human rights activists, it will likely produce a more effective approach to the protection of human rights in the long term.

United Nations Office of the High Commissioner for Human Rights, in cooperation with the International Bar Association. *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors, and Lawyers*. Professional Training Series, no. 9. New York and Geneva: United Nations, 2003. <http://www1.umn.edu/humanrts/monitoring/hradmin.html>.

Both a manual and a facilitator's guide, this resource provides a comprehensive core curriculum on international human rights standards for legal professionals. In addition to offering basic information on international human rights law and the jurisprudence of universal and regional bodies and national courts, each module of the manual addresses a specific human rights area related to the administration of justice. Modules include "Major Regional Human Rights Instruments and the Mechanisms for Their Implementation," "Independence and Impartiality of Judges, Prosecutors and Lawyers," "International Legal Standards for the Protection of Persons Deprived of Their Liberty," and "Protection and Redress for Victims of Crime and Human Rights Violations."

Free Legal Assistance and Legal Aid

de Bertodano, Sylvia. *Report on Defense Provision for the Special Court for Sierra Leone*. 2003. http://www.specialcourt.org/Outreach/LegalProfession/NPWJ_ReportOnDefenceAtTheSpecialCourt.pdf.

This report was prepared at the request of the Registry of the Special Court for Sierra Leone (SCSL) and No Peace Without Justice (NPWJ) to assist those involved in making arrangements for the defense of accused persons before the SCSL. Derived from consultations with SCSL participants, participants in the legal system of Sierra Leone, lawyers, and others who have worked in international justice mechanisms, this report aims to avoid problems that other international justice mechanisms have encountered with the defense of the accused persons. It discusses requirements of a defense system, the use of public defenders or a list system, and the defense unit.

International Criminal Court. Assembly of States Parties. *Proposal for a Draft Code of Professional Conduct for Counsel before the International Criminal Court*. Resolution ICC-ASP/3/11/Rev. 1. August 27, 2004. <http://www.icc-cpi.int/library/asp/ICC-ASP-3-11-Rev1-English.pdf>.

This draft code of professional conduct is awaiting approval by the Assembly of States Parties. The text discusses general principles, such as the solemn undertaking by counsel, independence of counsel, professional conduct of counsel, respect for professional secrecy and confidentiality, and the counsel-client relationship. For representation by counsel, the

code addresses the representation agreement and remuneration of counsel. The execution of a representation agreement concentrates on relations with the court and with other parties to the procedure. The final chapter, on the disciplinary regime, addresses misconduct, liability for conduct of assistants and other staff, due process of law, the disciplinary board, sanctions, and appeals.

Judicial Independence

Council of Europe. Committee of Ministers. Recommendation R (94) 12. On the Independence, Efficiency, and Role of Judges. 1994. [http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation\(94\)12.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/administrative_law_and_justice/texts_&_documents/Conv_Rec_Res/Recommendation(94)12.asp).

This recommendation provides general principles related to judges, specifically on the independence and authority of judges, proper working conditions, associations, judicial responsibilities, and failure to carry out responsibilities and disciplinary offenses. It also provides an explanatory memorandum to assist in the understanding and application of the principles.

Grimheden, Jonas. *Themis v. Xiezh: Assessing Judicial Independence in the Peoples' Republic of China under International Human Rights Law*. 2004. http://www.lub.lu.se/luft/diss/law_37/law_37_transit.html.

This is a guide to international human rights law and jurisprudence on judicial independence as a basic human right.

Henderson, Keith and Violaine Autheman. *Global Best Practices: A Model State of the Judiciary Report: A Strategic Tool for Promoting, Monitoring and Reporting on Judicial Integrity Reforms*. Washington, D.C.: IFES, Summer 2003; revised April 2004. http://www.ifes.org/publication/20ef1c5bb97b3a464dc4d8bb4da18bac/WhitePaper_6_FINAL.pdf.

By providing the public with quality information on its status through annual, systematic, prioritized monitoring and reporting tools, the judiciary increases its accountability and transparency. IFES designed a set of core Judicial Integrity Principles, developed from other consensus principles and emerging best practices, and a model framework for monitoring and reporting on the state of the judiciary. This reporting method aims to enable donors, jurists, experts, and reformers to create a strategic, comprehensive program that focuses on key judicial reforms and measures progress on an on-going basis.

International Bar Association. *Minimum Standards of Judicial Independence*. 1982. <http://www.ibanet.org/images/downloads/Minimum%20Standards%20of%20Judicial%20Independence%201982.pdf>.

These minimum standards for achieving judicial independence address the relationship between judges and the executive and between judges and the legislature; the terms and nature of judicial appointments; the press, the judiciary and the courts; standards of conduct; the securing of impartiality and independence; and the internal independence of the judiciary.

Latimer House Guidelines on Parliamentary Supremacy and Judicial Independence for the Commonwealth. 1998 (updated 2002), annexed to the Commonwealth Principles on the Accountability of and Relationship between the Three Branches of Government, 2003. http://www.cpahq.org/uploadedFiles/Information_Services/Publications/CPA_Electronic_Publications/Latimer%20House%20Guidelines.pdf.

These guidelines address good-practice governing relations between the executive, Parliament, and the judiciary to promote good governance, the rule of law, and human rights.

United Nations Office on Drugs and Crime. *Criminal Justice Assessment Toolkit 2: The Independence, Impartiality and Integrity of the Judiciary*. 2006. http://www.unodc.org/pdf/criminal_justice/JUDICIARY.pdf.

This resource, aimed at those international and domestic actors undertaking a criminal justice assessment, is part of a series of criminal justice assessment tools that constitute the overall toolkit developed by the United Nations Office on Drugs and Crime. *Toolkit 2* focuses on assessing the independence, impartiality, and integrity of a judiciary. It also provides a framework for assessing the strengths and weaknesses of a system in terms of the role, capacity, and resources of the judiciary.

U.S. Office for Democracy and Governance. *Guidance for Promoting Judicial Independence and Impartiality*. January 2002. http://www.ifes.org/files/rule-of-law/judicial_independence.pdf.

This guide aims to promote understanding of the issues that affect judicial independence. It also provides assistance to donors and their local counterparts to design and implement programs that effectively strengthen judicial independence. The conclusions presented in this guide are based on the findings of experts from twenty-six countries and a series of round-table seminars that discussed those findings.

Juvenile Justice

Penal Reform International. *Ten Point Plan on Juvenile Justice: A Contribution to the Committee on the Rights of the Child Day of General Discussion on "State Violence against Children."* Geneva, 22 September 2000. <http://www.crin.org/docs/resources/treaties/crc.25/penalref.pdf>.

Building on international instruments on juvenile justice, the *Ten Point Plan on Juvenile Justice* aims to reduce violence within justice systems

through general education and social welfare. The *Plan* argues that parents, teachers, social workers, and psychologists are more likely to help young people in conflict become law-abiding adults than are police, courts, and prisons.

UNICEF. International Child Development Centre. *Innocenti Digest: Juvenile Justice*. 1998. <http://www.unicef-icdc.org/publications/pdf/digest3e.pdf>.

This resource focuses on young people under the age of eighteen who come into contact with the justice system. It addresses issues such as arrest and detention of juveniles and juvenile dispositions from the perspective of international human rights norms and standards.

United Nations, et al. *Protecting the Rights of Children in Conflict with the Law*. May 2005. http://www.omct.org/pdf/cc/2005/Protect_the_rights_of_children_in_conflict_with_the_law.pdf.

This report provides program and advocacy experiences on juvenile justice.

Mutual Legal Assistance and Extradition

United Nations Office on Drugs and Crime. *Model Law on Extradition*. 2004. http://www.unodc.org/pdf/model_law_extradition.pdf.

Members of the international community drafted this model law based on the premise that effective cooperation in the field of extradition requires streamlined national legislation. Although treaties and arrangements may provide the procedural or enabling framework, this model law focuses on the national implementation of those international obligations, or may substitute the ratification of treaties by creating a self-standing framework for international cooperation. The model law addresses substantive conditions for extradition, grounds for refusal of an extradition request, documentary requirements, and extradition proceedings.

United Nations Office on Drugs and Crime. *Model Mutual Assistance in Criminal Matters Bill*. 2000. http://www.unodc.org/pdf/lap_mutual-assistance_2000.pdf.

This bill, if enacted, enables a state to cooperate with foreign states in criminal investigations and proceedings. It addresses the authority to make and act on mutual legal assistance requests, outlines the required contents of requests for assistance, and outlines the safe conduct guarantee. The bill also discusses foreign requests for an evidence-gathering order or a search warrant, virtual evidence-gathering order by video link, consensual transfer of detained persons, enforcement of foreign confiscation or restraining orders, and location and sharing of proceeds of crime.

United Nations Office on Drugs and Crime. *Revised Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters*. 2002. http://www.unodc.org/pdf/model_treaty_extradition_revised_manual.pdf.

This manual contains the *Revised Manual on the Model Treaty on Extradition*, *Revised Manual on the Model Treaty on Mutual Assistance in Criminal Matters*, *Model Treaty on Extradition (as adopted by General Assembly resolution 45/116 and subsequently amended by General Assembly resolution 52/88)*, and *Model Treaty on Mutual Assistance in Criminal Matters (as adopted by General Assembly resolution 45/117 and subsequently amended by General Assembly resolution 53/112)*.

Prosecution of Legal Persons

Council of Europe. Committee of Ministers. Recommendation no. R (88) 18. Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities. 1988. <https://wcd.coe.int/ViewDoc.jsp?id=709235&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

In light of the increasing number of criminal offenses committed in the exercise of the activities of enterprises, the Council of Europe issued Recommendation no. R 88 (18) to guide the law and practice of its member states. This recommendation contains ten core principles regarding liability and criminal sanctions relevant to legal persons.

Penalties and Criminal Dispositions

Commission of the European Communities. Green Paper on the Approximation, Mutual Recognition and Enforcement of Criminal Sanctions in the European Union. COM (2004) 334 final. April 2004. http://ec.europa.eu/justice_home/news/consulting_public/gp_sanctions/green_paper_en.pdf.

The Green Paper analyzes national differences in criminal penalties and the problems thus posed for judicial cooperation between member states in the European Union. The paper provides a useful comparative discussion of a broad range of penalties and criminal dispositions.

Council of Europe. Committee of Ministers. Recommendation no. R (92) 17. On Consistency in Sentencing. 1992. <https://wcd.coe.int/ViewDoc.jsp?id=615699&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

This recommendation sets out a body of principles applicable to the sentencing of convicted persons. The recommendations fall under a number of headings, including the rationale for sentencing; penalty structure; aggravating and mitigating factors; previous convictions; giving reasons for sentences; prohibition of *reformatio in pejus*; time spent in custody; the role of the prosecutor; sentencing studies and information; and statistics and research.

Council of Europe. Committee of Ministers. Resolution (76) 10. On Certain Alternative Penal Measures to Imprisonment. 1976. <https://wcd.coe.int/ViewDoc.jsp?id=663981&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75>.

This resolution urges governments to examine their criminal legislation and any obstacles to providing alternatives to imprisonment for persons convicted of criminal offenses. In doing so, this resolution discusses the merits and modalities of introducing alternatives to imprisonment into law.

Penal Reform International. *Index of Good Practices in Reducing Pre-trial Detention*. 2005. <http://www.penalreform.org/index-of-good-practices-in-reducing-pre-trial-detention.html>.

Created with policymakers and stakeholders in criminal justice reform in mind, this practical index provides examples of good practices in reducing pretrial detention.

Witness Protection

Council of Europe. *Procedural Protective Measures for Witnesses: Training Manual for Law-Enforcement Agencies and the Judiciary*. Strasbourg: Council of Europe Publishing, 2006.

Witnesses contribute to the investigation, prosecution, and adjudication of serious and organized crimes. This training manual provides information on procedural and nonprocedural protection measures to help ensure that witnesses can testify freely and without intimidation, and that their life and the lives of their relatives and other persons close to them are protected before, during, and after trial. This manual is a tool for law enforcement officials, judges, and prosecutors, as well as for teachers and students.

Victim Protection

Council of Europe. Committee of Ministers. Recommendation no. R (85) 11. On the Position of the Victim in the Framework of Criminal Law. 1985. <http://www.legislationline.org/legislation.php?tid=99&lid=4845>.

This recommendation recognizes that the criminal justice system typically focuses on the relationship between the state and the offender while neglecting the needs of the victim. It advises governments of member states to review their legislation and practice regarding the needs of victims during police investigations, prosecution, questioning of the victim, and court proceedings, and to assess measures to respect the privacy of victims and, if necessary, to provide special protection of the victim.

United Nations Office on Drugs and Crime. *Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*. 1999. <http://www.uncjin.org/Standards/9857854.pdf>.

This handbook was drafted to accompany the United Nations Basic Principles of Justice for Victims of Crime and Abuse of Power to assist states in giving effect to these principles in a domestic context. The handbook contains practical examples and illustrations on how to implement victim service programs; ensure victim sensitive responses; and develop policies, procedures, and protocols for criminal justice agencies and others who come into contact with victims.

Criminal Law Reform Resources

Comparative Criminal Procedure

Ashworth, Andrew. *Human Rights, Serious Crime, and Criminal Procedure*. London: Sweet & Maxwell, 2002.

Professor Andrew Ashworth delivered the 53rd series of lectures of the Hamlyn Trust at De Montfort University, Queen's University, Belfast, and Cardiff Law School during November 2001. This book records the themes of those lectures, discussing the need to balance human rights with the need to address serious criminality.

Bradley, Craig M., ed. *Criminal Procedure: A Worldwide Study*. Durham: Carolina Academic Press, 1999.

This source is intended as a reference and a teaching tool to compare criminal procedures in different countries and traditions. The countries discussed include Argentina, Canada, China, England and Wales, France, Germany, Israel, Italy, the Russian Federation, South Africa, Spain, and the United States. For each country, the author provides an introduction, then discusses the police and domestic criminal procedure law.

Delmas-Marty, and Mireille, J. R. Spencer, eds. *European Criminal Procedures*. Cambridge: Cambridge University Press, 2005.

This source provides an analysis of criminal procedure in Belgium, England, France, Germany, and Italy. It compares the different systems and traditions. Extended essays discuss public prosecutors, rights of victims and defendants, evidence, negotiated justice, and media influence.

Criminal Law Reform Assessment Tools

American Bar Association. *ICCPR Index*. http://www.abanet.org/ceeli/special_projects/iccpr/home.html.

The *ICCPR Index* is an assessment tool for measuring a state's legislative and programmatic compliance with the International Covenant on Civil and Political Rights.

Rausch, Colette, ed. *Combating Serious Crimes in Postconflict Societies: A Manual for Policymakers and Practitioners*. Washington, D.C.: United States Institute of Peace Press, 2006. http://www.usip.org/ruleoflaw/projects/serious_crimes.html#download.

Chapter 2 of this manual discusses the importance of undertaking a comprehensive and thorough criminal justice assessment. It also provides suggestions on how to conduct such an assessment, including recommendations on personnel, timing, and methodology. Chapter 3 discusses how to identify and assess the legal framework in a post-conflict state.

United Nations Office of the High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Mapping the Justice Sector*. New York and Geneva: United Nations, 2006. http://www.ohchr.org/english/about/publications/docs/ruleoflaw-Mapping_en.pdf.

The result of two years of consultations with departments and agencies of the United Nations, civil society leaders, and national experts, this OHCHR report is based primarily on lessons learned in Kosovo, Sierra Leone, and East Timor. Topics addressed include assessing whether and how a country's justice system contributed to conflict; the prosecution of perpetrators of crimes such as genocide, crimes against humanity, and war crimes; the establishment of truth commissions; and the vetting and monitoring of legal systems established after the end of hostilities.

United Nations Office on Drugs and Crime. *Criminal Justice Assessment Toolkit*. December 2006. http://www.unodc.org/unodc/criminal_justice_assessment_toolkit.html.

The UNODC *Criminal Justice Assessment Toolkit* is a standardized and cross-referenced set of tools designed to enable United Nations agencies, government officials engaged in criminal justice reform, and other organizations and individuals to conduct comprehensive assessments of criminal justice systems; to identify areas of technical assistance; to assist agencies in the design of interventions that integrate relevant United Nations standards and norms; and to assist in training on these issues. The tool kit contains sixteen separate assessment tools under the broad headings of policing (public safety and police service delivery; the integrity and accountability of the police; crime investigation; police information and intelligence systems), access to justice (the courts; the independence, impartiality, and integrity of the judiciary; the prosecution service; legal defense and legal aid), custodial and noncustodial measures (the prison system; detention prior to adjudication; alternatives to incarceration; social reintegration), and cross-cutting issues (criminal justice information; juvenile justice; victims and witnesses; and international cooperation).

Customary/Traditional Systems of Justice

Chirayath, Leila, Caroline Sage, and Michael Woolcock. *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*. July 2005. http://siteresources.worldbank.org/INTWDR2006/Resources/477383-118673432908/Customary_Law_and_Policy_Reform.pdf.

This work analyzes contemporary critiques of customary legal systems and argues that, despite the challenges such systems present, the success of a legal reform process depends on engaging with them. The authors draw lessons from experiences in Tanzania, Rwanda, and South Africa and present the implications for ongoing policy reform initiatives.

Penal Reform International. *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems*. 2000. <http://www.penalreform.org/interim/publications/manuals>.

This work discusses the nature, scope, and relevance of traditional and informal justice systems in sub-Saharan Africa. It provides examples drawn from not only Africa but also South Asia. It also offers guidance on the relationship that should exist between a state-run criminal justice system and traditional or informal justice systems and elaborates good-practice guidelines for those working with traditional or informal justice systems.

United Kingdom. Department for International Development (DFID). *Non-State Justice and Security Systems: A Guidance Note*. 2004. <http://www.gsdc.org/docs/open/SSAJ101.pdf>.

Recognizing the importance of nonstate, or customary, systems of justice as complements to formal systems of justice, DFID drafted this note, which provides practical guidance on how to work with nonstate systems.

Law Reform Agencies

Association of Law Reform Agencies in East and Southern Africa. *Best Practices in Law Reform*. March 2005. http://www.doj.gov.za/alraesa/conferences/papers/s3B_sayers.pdf.

This paper looks at a number of topics and issues relating to law reform commissions, including consultants, legal research, consultation, policy papers, reports, and the need for publicity in the law reform process. The paper concludes with a chart showing the different stages in a law reform project.

Commonwealth Secretariat. *Law Reform Agencies: Their Role and Effectiveness*. October 2005. http://www.calras.org/Other/future_commonwealth.htm.

This document presents an introductory overview of the variety of law reform agencies and provides basic information about such agencies.

Murphy, Gavin. *Law Reform Agencies*. March 2004. http://www.justice.gc.ca/en/ps/inter/law_reform/index.html.

This guide examines the role, organization, and operation of reform agencies in the United Kingdom, Canada, and other Commonwealth countries for the purpose of outlining how a new law reform agency might be set up. The guide also presents a checklist of questions to be considered when establishing a law reform agency.

New South Wales Law Reform Commission. *The Law Reform Process: A Step by Step Guide*. 2006. http://www.lawlink.nsw.gov.au/lawlink/lrc/ll_lrc.nsf/pages/LRC_about1.

This guide includes discussion on the special features of law reform commissions and a step-by-step guide to the law reform process.

Opeskin, Brian, and David Weisbrot, eds. *The Promise of Law Reform*. Sydney, Australia: Federation Press, 2005.

This book, a collection of writings on law reform from around the world, is divided into seven parts and addresses aspects of law reform and law reform commissions, including the history, purpose, and function of law reform commissions; their institutional design, methods, operations, outputs, and outcomes; and mutual assistance among different commissions. The book also provides practical examples of law reform in action around the world.

Robertson, Honorary Justice J. Bruce. *Law Reform: What Is Our Knitting? How Do We Stick to It?* 15 March 2005. <http://www.lawcom.govt.nz/SpeechPaper.aspx>.

The author, president of the New Zealand Law Commission, draws on the example of that body as he traces the history of law reform commissions. He also offers recommendations regarding the composition, mission, structural and operational framework, and workload of commissions.

Law Reform Process

Berkowitz, Daniel, Katharina Pistor, and Jean-Francois Richard. *The Transplant Effect*. January 2001. <http://www.sipa.columbia.edu/REGIONAL/HI/lawreview.pdf>.

Drawing on extensive research and empirical data, the authors discuss the phenomenon of legal transplants and set out a methodology for employing external sources of law through a process of adaptation.

Bernstein, David S. "Process Drives Success: Key Lessons from a Decade of Legal Reform." *Law in Transition* (Autumn 2002): 2–13. <http://www.ebrd.com/country/sector/law/articles/archive/index.htm>.

This article, from an online journal produced by the European Bank for Reconstruction and Development, serves as a guide that identifies lessons for institutions and agencies that provide legal reform assistance. It argues that a successful reform project is one that adapts internationally accepted principles and standards to the local legal environment, focuses time and resources on implementation and enforcement, and, most importantly, works through an open, transparent, and inclusive process.

Carlson, Scott. *Legal and Judicial Rule of Law in Multidimensional Peacekeeping Operations*. 2006. <http://pbpu.unlb.org/pbpu/library/ROL%20Lessons%20Learned%20Report%20%20March%202006%20FINAL.pdf>.

This report reflects on recent experience with judicial and legal reforms in United Nations peacekeeping operations, identifies a variety of lessons learned, and sets out recommendations for achieving future reforms.

Hammergren, Linn. *Code Reform and Law Revision*. Centre for Democracy and Governance, Bureau for Global Programs, Field Support, and Research, U.S. Agency for International Development. 1998. <http://pdf.dec.org/pdffdocs/pnacd022.pdf#search=%22hammergren%2C%20code%20reform%20and%20revision%22>.

This publication discusses the experience of the U.S. Agency for International Development in code reform and revision in Latin America. The author, reflecting on the mixed results of these reform efforts, outlines techniques to improve future efforts and to avoid some of the mistakes that have been made in the past.

Inter-American Development Bank. *Resource Book on Participation*. 1997. http://www.iadb.org/aboutus/VI/resource_book/table_of_contents.cfm?language=english.

Based on decades of experience in the field of development, this report argues that participation can significantly enhance the effectiveness of law reform efforts. It elaborates upon the meaning and scope of participation and identifies who the stakeholders are, when participation should occur, how participation can be facilitated, and what challenges must be overcome to ensure a participatory approach.

Nelken, David, and Johannes Feest, eds. *Adapting Legal Cultures*. Portland, Oregon: Hart Publishing, 2001.

This book looks at the theory and practice of legal borrowing and adaptation around the world in the context of different legal cultures. The first part of the book examines what is meant by “legal transplantation,” weighs arguments for and against it, and recounts successes and failures in legal transplantation. The second part sets out a number of case studies of legal adaptation.

Legislative Drafting in Plain English

Australia Office of Parliamentary Counsel. *Plain English Manual*. 2003. <http://www.opc.gov.au/about/docs/PEM.pdf>.

The Plain English Movement promotes the drafting of legislation in language that is more accessible both to the legal community and to persons to whom the law applies. This manual provides guidance on how to draft in a plain English style, including how to plan a draft, aids to understanding legal provisions, good writing habits, and drafting phrases to avoid.

Turnbull, Ian. *Plain English and Drafting in General Principles*. 1993. http://www.opc.gov.au/plain/docs/plain_draftin_principles.rtf.

This paper discusses the various styles of drafting, including traditional drafting, drafting in plain English, and drafting in general principles. Examining the relative strengths and weaknesses of each style, the author argues in favor of the use of plain English drafting as a means of making law easier to understand without sacrificing high standards of precision.

Legislative Drafting Manuals

Chabot, Elliot C. *List of Online Legislative Drafting Resources*. <http://ili.org/ld/manuals.htm>.

This document offers numerous samples of legislative drafting manuals that might be helpful when crafting new legislation.

Useful Web Sites

African Commission on Human and Peoples' Rights

<http://www.achpr.org>

The African Charter on Human and People's Rights established this commission to ensure the promotion and protection of human and peoples' rights throughout the African continent. The commission has its headquarters in Banjul, The Gambia. This Web site provides access to documents and resolutions of the commission, including "Respect for and Strengthening of the Independence of the Judiciary."

Council of Europe, Human Rights Handbooks Homepage

http://www.coe.int/t/e/human_rights/handbookse.asp

This Web site contains links to eight handbooks on various human rights, including the right to respect for family and private life (relevant to search, seizure, and covert surveillance in criminal investigations), the right to a fair trial, the right to liberty and security of the person, the prohibition of torture, and the right to life.

Egmont Group

<http://www.egmontgroup.org>

The Egmont Group is an informal network of international financial intelligence units that cooperate and share information, training, and expertise. This Web site contains resources relevant to combating money laundering and financing of terrorism through the establishment of financial intelligence units.

European Court of Human Rights (ECHR)

<http://cmiskp.echr.coe.int/gentkpss/gen-recent-hejud.asp>

This Web site provides access to the documents and jurisprudence of the ECHR.

Financial Action Task Force on Money Laundering (FATF)

<http://www.fatf-gafi.org>

Created in 1989, FATF is an intergovernmental body whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.

InterAmerican Court of Human Rights

<http://www.corteidh.or.cr/>

This Web site provides access to the documents and jurisprudence of the InterAmerican Court of Human Rights.

International Committee for the Red Cross (ICRC)

<http://www.icrc.org>

This Web site provides access to resources regarding the background, services, and mission of the ICRC. It also references international humanitarian law and provides access to a treaty database on the topic. According to international law, ICRC officials may decline to cooperate with investigative or judicial inquiries as part of their immunity from testifying. For more information on this privilege, see Rona, Gabor, “The ICRC Privilege Not to Testify: Confidentiality in Action,” *International Review of the Red Cross* no. 845 (March 2002): 207–219. The article is available on this Web site.

International Criminal Court (ICC)

<http://www.icc-cpi.int/home.html&l=en>

The ICC is an independent, permanent court that tries persons accused of serious international crimes, particularly genocide, crimes against humanity, and war crimes. This Web site includes the basic legal documents and jurisprudence of the ICC.

International Criminal Tribunal for the Former Yugoslavia (ICTY)

<http://www.un.org/icty>

The United Nations Security Council established the ICTY in 1993 to address the serious violations of international humanitarian law committed in the former Yugoslavia since 1991. This Web site includes the basic legal documents and jurisprudence of the ICTY on genocide, crimes against humanity, and war crimes.

International Criminal Tribunal for Rwanda (ICTR)

<http://www.un.org/icttr>

The United Nations Security Council established the ICTR in 1994 to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda in 1994. This Web site includes the basic legal documents and jurisprudence of the ICTR on genocide, crimes against humanity, and war crimes.

International Money Laundering Network (IMoLIN)

<http://www.imolin.org/imolin/index.html>

IMoLIN is an Internet-based network assisting governments, organizations, and individuals in the fight against money laundering. IMoLIN was developed with the cooperation of the world's leading anti-money laundering organizations. This Web site includes a database on money laundering legislation and regulations throughout the world, an electronic library, and a calendar of events in the anti-money laundering field.

Plain English Campaign

<http://www.plainenglish.co.uk/drafting.htm>

This site discusses and provides resources on the Plain English Movement, a movement that promotes the drafting of legal documents in easily comprehensible language.

Privacy International (PI)

<http://www.privacyinternational.org>

PI is a human rights group formed in 1990 as a watchdog on surveillance and privacy invasions by governments and corporations. This Web site provides a wide range of materials on privacy-related matters, such as communication surveillance, data protection and privacy laws, financial surveillance, freedom of expression, and antiterrorism activities.

Special Court for Sierra Leone

<http://www.sc-sl.org/>

The government of Sierra Leone and the United Nations jointly established the Special Court for Sierra Leone. It is mandated to try those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since November 30, 1996. This Web site provides information about the court's organs, documents, and cases.

Terrorism, Transnational Crime, and Corruption Center

(TraCCC), American University

<http://www.american.edu/traccc>

TraCCC is devoted to teaching, research, training, and formulating policy advice in transnational crime, corruption, and terrorism. TraCCC's fundamental goal is to better understand the causes and scope of transnational

crime and corruption and to propose well-grounded policy to reduce and eliminate these problems. This Web site contains numerous publications and online resources on terrorism, transnational crime, and corruption.

Transparency International

<http://www.transparency.org>

Transparency International is a global civil society with the mission to create change toward a world free of corruption. This Web site provides numerous research briefs, tools, and other publications on combating corruption. It also contains region- and country-specific information on corruption.

United Nations Human Rights Committee

<http://www.unhchr.ch/html/menu2/6/hrc.htm>

The Human Rights Committee monitors the implementation of the International Covenant on Civil and Political Rights and its protocols in the territory of states parties. The committee, composed of eighteen independent experts, convenes three times a year for three-week sessions, normally in March at the United Nations headquarters in New York, and in July and November at the United Nations Office in Geneva. This Web site provides access to the rules of procedures, sessions, individual complaints, official records, and press releases of the committee.

United Nations Office on Drugs and Crime (UNODC)

<http://www.unodc.org>

UNODC is a global leader in the fight against illicit drugs and international crime. Established in 1997, it is mandated to assist member states in their struggle against illicit drugs, crime, and terrorism.

United Nations Office on Drugs and Crime, Anti-Corruption Resource Guide

http://www.unodc.org/unodc/event_2004-12-09_1_resource_guide.html

This Web site is an anticorruption resource with information on corruption and conflict, asset looting and the laundering of proceeds of corruption, corruption in international organizations, political corruption, corruption within the justice system, corruption in the private sector, corruption and organized crime, the United Nations Convention against Corruption, criminalization and enforcement, international cooperation and asset recovery, and technical assistance by UNODC in combating corruption.

United Nations Office on Drugs and Crime, Handbooks and Manuals on the United Nations Standards and Norms in Crime Prevention and Criminal Justice

http://www.unodc.org/unodc/cicp_standards_manuals.html

This Web site collates the various handbooks and manuals on crime prevention and criminal justice produced by the United Nations. It includes resources on pretrial detention, prisons, criminal justice standards for peacekeeping police, juvenile justice, justice for victims and abuse of power, domestic violence, computer-related crime, extradition, and mutual legal assistance. It also contains links to the United Nations Special Rapporteur on Torture, the United Nations Committee against Torture, the Human Rights Committee, the Committee on the Rights of the Child, the Committee on the Elimination of All Forms of Discrimination, the United Nations Working Group on Contemporary Forms of Slavery, the United Nations Special Rapporteur of the Commission on Human Rights on the Sale of Children, Child Prostitution and Child Pornography, and the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences.

United Nations Office of the High Commissioner for Human Rights (OHCHR)

<http://www.unhchr.ch>

A department of the Secretariat of the United Nations, OHCHR is mandated to promote and protect the enjoyment and full realization of all rights established in the Charter of the United Nations and in international human rights laws and treaties. The home Web site includes links to such treaty bodies as the Committee on the Rights of the Child, the Human Rights Committee, and the Committee against Torture, and other special mechanisms such as the Special Rapporteur on Violence against Women and the Special Rapporteur on Torture. This Web site also contains the full text of the universal human rights instruments.

University of Minnesota Human Rights Library

<http://www1.umn.edu/humanrts/links/alphalinks.html>

This site compiles various human rights documents, links, reports, and projects. Its list is alphabetized by topic.

World Bank Anti–Money Laundering and Combating the Financing of Terrorism

<http://www1.worldbank.org/finance/html/amlcft>

This Web site contains a variety of documents, publications, and other resources on money laundering and the financing of terrorism.

World Bank Anticorruption

<http://www.worldbank.org/anticorruption>

This Web site discusses various anticorruption strategies and provides information on tools, resources, and country and regional approaches to corruption.

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